File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

SUPPLEMENTARY MOTION BRIEF OF THE RECEIVER (INKSTER APPROVAL AND VESTING ORDER)

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I. LIST OF DOCUMENTS

1. The Supplementary First Report of the Receiver dated April 27, 2020;
2. The Second Report of the Receiver dated May 27, 2020;
3. The Supplementary Second Report of the Receiver dated May 31, 2020;
4. The Third Report of the Receiver dated June 22, 2020;
5. The Fourth Report of the Receiver dated June 27, 2020;
6. The Supplementary Third Report of the Receiver dated June 29, 2020;
7. The Fifth Report of the Receiver dated July 6, 2020;
8. The Sixth Report of the Receiver dated August 3, 2020;
9. The Seventh Report of the Receiver dated September 10, 2020;
10. The Supplementary Seventh Report of the Receiver dated September 14, 2020;
11. The Eighth Report of the Receiver dated September 28, 2020;
12. The Supplementary Eighth Report of the Receiver dated October 12, 2020;
13. The Ninth Report of the Receiver dated November 2, 2020; and
14. The Supplementary Ninth Report of the Receiver dated November 10, 2020.

II. LIST OF AUTHORITIES

Tab

1. Frank Bennett, *Bennet on Receiverships*, 3rd ed (Toronto: Thomson Reuters Canada Limited, 2011);

2. Muir Hunter, *Kerr and Hunter on Receivers and Administrators*, 18th ed (London: Sweet and Maxwell, 2005);

3. *White Oak Commercial Finance, LLC v Nygard Holdings (USA) Limited et al*, 2020 MBQB 58;

4. *Milwaukee & Minnesota R. Co. v Soutter*, 69 US 510 (1864);

5. Section 37(1) of *The Court of Queen's Bench Act*, CCSM c C280; and

6. *Third Eye Capital Corporation v Ressources Dianor Inc.,* 2019 ONCA 508.

III. POINTS TO BE ARGUED

Introduction

1. The Receiver files this brief in order to respond to certain matters raised in the Affidavit of Greg Fenske affirmed November 5, 2020, the Affidavit of Joe Albert affirmed November 5, 2020 attaching the First Pre-Filing Report of Albert Gelman Inc. (the "**Gelman Report**"), and certain authorities relied upon by the Respondents in their Brief dated November 5, 2020 (the "**Respondents' Brief**"), with respect to, *inter alia*, the discharge of the Receiver and the subrogation rights of a guarantor.

2. The Receiver files the Supplementary Ninth Report of the Receiver dated November 10, 2020 (the "**Supplementary Ninth Report**") concurrently with this brief.

3. The Receiver repeats and relies on their Motion Brief dated November 2, 2020.

Discharge of the Receiver

4. The Respondents have provided no authority to support the discharge of the Receiver in the circumstances of this case.

5. The Respondents assert that:

> …The satisfaction of the Lenders' claim is, in fact, of the greatest significance, as it means that the receivership cannot continue: the purpose of the receivership has been achieved and any extension of it would be not merely inappropriate, but unlawful.
>
> …
>
> … The Receiver's purpose has been satisfied, it is currently in the position of a trespasser on the Respondents' property, and it should be discharged

Respondents' Brief, at paras 11 and 30.

6. This is the same "single purpose receivership" argument that the Respondents have made in past, and which was specifically not accepted by this Honourable Court in making the Landlord Charge Terms Order. The purposes of this receivership are captured by the terms of the Receivership Order, which do not terminate the mandate of the Receiver upon satisfying, or realizing sufficient proceeds to satisfy, obligations of the Respondents to the Applicants alone.

7. The textbook authority cited by the Respondents relates to instances of a mortgagee-in-possession or a privately-appointed receiver, and not to a court-appointed receiver.

8. In support of the above assertion, the Respondents rely upon two textbook authorities.

9. The first textbook authority relied on by the Respondents is an excerpt from the textbook *Bennett on Receiverships,* which reads as follows:

> … [I]f the receiver has successfully managed a debtor's business to the extent of retiring the debt of the security holder, the receiver ought not to continue operating the business. The receiver will be without authority and therefore notwithstanding its good intentions, the receiver may become a trespasser and liable for damages. The receiver remains accountable and becomes a fiduciary until a time when the receiver returns the business to the debtor.

Frank Bennett, *Bennet on Receiverships*, 3rd ed (Toronto: Thomson Reuters Canada Limited, 2011) at p 605 [Tab 1]

10. With respect, it appears this excerpt relates to privately-appointed receivers, not court-appointed receivers. It is extracted from Part I of "Chapter 11 – Discharge" of the textbook, which provides the author's overview of the grounds for the

discharge of receivers, generally. The author cites *Kennedy v De Trafford*, [1896] 1 Ch 763 (Eng Ch Div), appeal dismissed [1987] AC 180 (UK HL) [*Kennedy*] in support of the above excerpt.

11. Part II of the said Chapter 11 relates specifically to author's consideration of court-appointed receivers, and Part III of the said Chapter relates specifically to the author's consideration of privately-appointed receivers. Part III contains the following passage, relating to private appointment receiverships, similar in concept to the excerpt relied upon by the Respondents, and in respect of which the author cites the same *Kennedy* case:

> If the receiver has retired the amounts owing under security, the receiver is not *pro tanto* discharged notwithstanding that the security holder has been paid in full. The receiver stands charged with the duty to account for the surplus to the debtor and, in this respect, the receiver becomes a fiduciary. If the receiver is aware of competing claims or subsequent security holders of the debtor, the receiver may pay the surplus into court by way of interpleading. Alternatively, the receiver may pay a subsequent security holder upon obtaining proper indemnity.
>
> If the receiver realized sufficient proceeds to retire the debt to the security holder together with remuneration, costs, charges, and expenses, the receiver must deliver up the surplus and any unrealizable assets, subject to the rights of subordinate creditors, to the debtor as soon as possible. In some cases this may occur before the receiver has completed its administration. If the receiver retains such proceeds and assets for an unreasonable period of time irrespective of whether the receiver has been terminated, both the receiver and the security holder may be liable for trespass and conversion.
>
> Bennett, *supra* at p 608 [Tab 1]

12. In fact, in *Kennedy*, Lord Herschell of the English Chancery Division of the High Court of Justice, considered the duties of a mortgagee in exercising its power of sale. It appears that there was no receiver (privately-appointed or otherwise) in this case. The case appears to be only relevant for inclusion in a textbook dealing with receivership if it is applied in relation to the duties of a privately-appointed receiver, because the duty of good faith of a privately-appointed receiver has been considered to be akin to that of the duty of good faith of a mortgagee, as both act as agent for the security holder and therefore assume the same duties and limitations in disposing of property.

13. The Respondents themselves have addressed the distinction between a privately-appointed receiver and court-appointed receiver in their Motion Brief of the Respondents (Leases) dated May 31, 2020 (Document No. 63) (the "**Respondents' May 31 Brief**"), at which time the Respondents were arguing (in these same proceedings) for the proposition that, in case of the within receivership, the Receiver "acted as a court officer for the benefit of all stakeholders".

14. The Respondents' May 31 Brief includes the following:

> To assess whether the Receiver can rely on the Rent Payment Provision, one must first assess the Canadian courts' distinction between a receiver, appointed pursuant to the terms of a security agreement, and acting as an agent of the secured creditor (a "**Private Receiver**") and a receiver appointed by court order and acting as a court officer for the benefit of all stakeholders (a "**Court Appointed Receiver**").
>
> The distinction between a Private Receiver and a Court Appointed Receiver is addressed at some length in *Ostrander v. Niagara Helicopters Ltd*. where the Court held:
>
> > …A very clear distinction must be drawn between the duties and obligations of a receiver-manager, such as Bawden, appointed by virtue of the contractual clauses

> of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitively in a fiduciary capacity to all parties involved in the contest.
>
> *Ostrander v. Niagara Helicopters Ltd*. 1973 CarswellOnt 325 (Ont. HC)

The Court Appointed Receiver's role has been described as follows:

> A receiver appointed by the court becomes a principal and is answerable to the court which appointed him. As a principal, he is not the agent of the security holder, the debtor or any particular creditor.
>
> *Canadian Commercial Bank v. Simmons Drilling Ltd.*, 1989 CarswellSask 48 (Sask. C.A.)
>
> *Bankruptcy and Insolvency Act*, section 247

In contrast, the Private Receiver is appointed by the secured creditor and acts as their agent. In a relatively recent decision, the Ontario Court of Appeal (citing with approval from its earlier decision in *Peat Marwick Ltd. v Consumers Gas Co*. 1980 CarswellOnt 167 held that:

> In realizing the security of the debenture holder, notwithstanding the language of the debenture [the Private Receiver] acts as the agent of the debenture holder…
>
> *58 Cardill Inc. v. Rathcliffe Holdings Limited* 2018 ONCA 672

Motion Brief of the Respondents (Leases) dated May 31, 2020 (Document No. 63) at paras 12-15 [Respondents' May 31 Brief]

15. The Respondents go on to indicate, correctly so, that the Receiver "is not White Oak's agent (as would be the case if it were a Private Receiver)".

Respondents' May 31 Brief at para 19(a)

16. The second textbook authority relied upon by the Respondents is *Kerr and*

Hunter on Receivers and Administrators ("Kerr") , from which two passages are cited.

17. The first Kerr passage is as follows:

> ***12-4 On satisfaction of encumbrance****. A receiver is generally continued until judgments in the action which he has been appointed; but,* ***if the right of the claimant ceases before that time, the receiver will be discharged at once****.*
>
> *[…]*

Respondents' Brief at para 12.

18. The Respondents have included only one portion of Kerr paragraph 12-4.Paragraph 12-4 of the Kerr textbook, in full, reads as follows (emphasis ours):

> **12-4 On satisfaction of encumbrance**. A receiver is generally continued until judgments in the action which he has been appointed; but, if the right of the claimant ceases before that time, the receiver will be discharged at once. <u>But where the appointment is made in a foreclosure action at the instance of a claimant who is subsequently paid off, another incumbrancer may, on application, obtain leave to be added as claimant, in which case the receivership may be continued. Similarly, if a receiver is appointed for the purposes of satisfying a number of claims, he will not be discharged merely on application of a satisfied claimant, if some of the other claims are outstanding. Proceedings may always be stayed without prejudice to the receivership.</u> [Emphasis added]

Muir Hunter, *Kerr and Hunter on Receivers and Administrators*, 18th ed (London: Sweet and Maxwell, 2005) at 260-261 [Tab 2]

19. The portion of the paragraph that is not included in the Respondents' Brief contains two very important exceptions with respect to the assertion that where "the right of a claimant ceases, the receiver will be discharged at once." That is, the receiver will not be discharged at once where:

(a) the appointment is made in a foreclosure action at the instance of a claimant

who is subsequently paid off and another incumbrancer obtains leave to be added as claimant; and

(b) where a receiver is appointed for the purposes of satisfying a number of claims.

20. Further, at paragraph 12-9 of *Kerr and Hunter on Receivers and Administrators*, the author states:

> **12-9 Application of one party only**. A receiver being appointed for the benefit of all the parties interested will not be discharged on the application of that party only at whose instance he was appointed.

Hunter, *supra* at 262 [Tab 2]

21. As was argued by the Respondents in the Respondents' May 31 Brief, the Receiver in the within case is not an agent of the Applicants, but rather, is "a receiver appointed by court order and acting as a court officer for the benefit of all stakeholders".

22. It is important to recall the circumstances in which the Receiver was appointed. As per the reasons of this Honourable Court it was held that the appointment of the Receiver was not only in the interests of the Applicant, but it was in the interest of all stakeholders:

> Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the BIA under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.
>
> While the court has the authority pursuant to s. 50.4(11) of the BIA to terminate the 30-day period on the basis that the

> criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.
>
> Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020. [emphasis added]

White Oak Commercial Finance, LLC v Nygard Holdings (USA) Limited et al, 2020 MBQB 58 at paras 32-34 [Tab 3]

23. The second Kerr passage cited by the Respondents is as follows:

> ***26-3 Duty to cease to act.*** *If, at any stage of his management of the company, the receiver has in his hands sufficient moneys to discharge all of the debts of the company which he is bound to discharge, all possible claims which could be made against him and in respect of which he is entitled to an indemnity, his own remuneration, and all moneys secured by the instrument pursuant to which he was appointed, it will be his duty to cease to act with all due expedition; this should confine his further activities to taking the necessary steps to conclude his administration. If he continues to act, any accounts will be taken against him thereafter with annual rests from the date when he has sufficient moneys in his hands to cover all such amounts.* ***His continuance in possession of the company's assets thereafter might also be regarded by the courts as wrongful, since his appointment is only for the purpose of enabling the encumbrancers, entitled to the benefit of the instrument under which he was appointed, to recover their debt; once his purpose has been achieved, there is no ground for his continuance in office. The effect would be that thereafter he would be in the position of trespasser***. [Original emphasis]

Respondents' Brief at para 12.

24. Paragraph 26-3 of *Kerr and Hunter on Receivers and Administrators,* is an excerpt from Chapter 26 of the Kerr textbook which is titled "Termination of Administrative Receivership" [emphasis added]. An "administrative receivership" refers to the private

engagement of a receiver by a secured lender. As such, paragraph 26-3 is not applicable to the circumstances of the within case. .

25. In support of discharge, the Respondents also rely on a case of the Supreme Court of the United States, *Milwaukee & Minnesota R. Co. v Soutter*, 69 US 510 (1864) [Tab 3], which, in fact, contrary to the Respondents' argument, stands for the proposition that discharge of a court-appointed receiver is a matter of the exercise of the court's discretion.

26. In *Soutter,* a receiver was appointed by order of the United States Supreme Court specifically in relation to certain amounts owing to a claimant pursuant to a mortgage over a road owned by Milwaukee & Minnesota R. Co. The following Order of the United States Supreme Court was made appointing a receiver:

> It is ordered that this cause be remanded to the Circuit Court of the United States for the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court *ascertain the amount of moneys in the hands of the receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest*, and apply it to the same; and that *if* the moneys thus applied are not sufficient to discharge the interest due on the first day of March, 1864, *then* to ascertain the balance remaining due at that date. *And in case such* balance is not paid within one year from the date of the order of the court ascertaining it, *then* an order shall be entered directing a sale of the mortgaged premises. [original emphasis]
>
> *Milwaukee & Minnesota R. Co. v Soutter*, 69 US 510 (1864) at 512 [Tab 4]

27. The receiver's mandate under the Receivership Order was extremely narrow. There had been four years of litigation around the amounts owed. The United States Supreme Court put a receiver in place to collect earnings from the road covered

by the mortgage pending the outcome of the litigation. Once the litigation was decided and a Court ruled on the amount due and owing, the receiver would pay into court the earnings it had collected to satisfy the judgment and discharge the mortgage. If the amount collected by the receiver was not enough to satisfy the judgment and discharge the mortgage, the receiver would continue to collect earnings for one year. If the earnings were still not enough to satisfy the judgment and discharge the mortgage, then the receiver would be permitted to sell the mortgaged road.

28. After the amount owing was ultimately determined by the Court, the debtor petitioned for leave to pay into court all money due to the complainants in the litigation on the condition that the receiver is discharged and possession of the mortgaged road is returned to the debtor. The debtor's petition was disputed by two additional creditors of the debtors who asserted lien claims (although unproven) against the mortgaged road.

29. The Circuit Court of the United States District of Wisconsin refused the debtor's petition, notwithstanding that allowing the debtor's petition would result in the satisfaction of the receiver's mandate pursuant to the Receivership Order.

30. The issue before the Court was whether a lower level court, that being the Circuit Court of the United States for the District of Wisconsin, could refuse to discharge the receiver contrary to the Receivership Order made by the Supreme Court.

31. Miller J. held that it was not within the lower court's discretion to refuse to discharge the receiver in accordance with the Receivership Order made by a higher court.

32. However, Miller J. went on to order that while the lower court did not have the authority to refuse to discharge the receiver upon payment in full of the amount owing

to the complainant, it would have had the authority to apply conditions to the receiver's discharge in relation to claims of other creditors. The Supreme Court ultimately ordered that the matter be remanded back to the Circuit Court and that the receiver would be discharged. However, that discharge would be conditional on the debtor company entering into bond with sufficient surety to pay certain other creditors, which would then be payable to the other creditors if the creditors established that they had valid liens on the property.

33. This case does not stand for the proposition that a court must discharge a receiver where a debt owing to the applicant creditor is satisfied. The Court explicitly stated that it accepted the general proposition that the discharge of a receiver is a matter of discretion with which a higher court will not ordinarily interfere with. However, the Court found that the general proposition was simply not applicable in the particular circumstances of the case before it.

34. Section 247 of the BIA and section 55 of *The Court of Queen's Bench Act*, CCSM c C280 (the "**QB Act**") provide for the appointment a receiver at the Courts' discretion. The timing of the discharge of the court-appointed receiver appointed is also a matter wholly within the discretion of the Court appointing it.

35. Additionally, there is no suggestion in the authorities that a court-appointed receiver, acting pursuant to the order of the court, and that has not been discharged by order of the court appointing it, is trespassing or engaging in any unlawful activity.

36. Moreover, the Receivership Order empowers and authorizes the Receiver to "take possession of and exercise control over the Property" to the "exclusion of all other Persons (as defined below), including the Debtors, and without interference from any

other Person.” The Inkster Property and the Broadway Property are Property within the meaning of the Receivership Order. The Receiver’s continued possession and control over any and all of the Debtors’ Property is done so pursuant to the Receivership Order made by this Honourable Court. The Receiver, by doing what it is explicitly empowered and authorized to do pursuant to the Receivership Order, cannot be said to be trespassing.

37. As described in paragraph 64 of the Receiver’s Ninth Report, there are still a number of matters, including the performance of certain statutory duties, that need to be completed by the Receiver as the Court’s officer in the administration of the receivership proceedings, including such matters as addressing the claims of landlords for “COVID rent”/ administering the Landlords’ Charge, completing the administration of WEPP, finalization of priority statutory claims, and many others relating to the broad community of interests and obligations served by the Receiver. Requirements to comply with statutory duties and complete activities that have been properly initiated by the Receiver (as the Court’s officer) in the course of these proceedings speaks to the need for the exercise of discretion in the timing and circumstances of discharge of the Receiver, so as not to leave such tasks incomplete.

38. As a final note, the Respondents' argument for the discharge of the Receiver is premised on the suggestion that all obligations to the Applicants have been satisfied, which in not the present case. As described in the Ninth Report of the Receiver, the Receiver continues to review two claims of the Applicants made and secured pursuant to the Credit Agreement, which have not yet been confirmed or paid.

Subrogation

39. NPL (along with the other Canadian Debtors) are Guarantors under the Credit Agreement. The guarantees, and the terms thereof, are described in the Credit Agreement. The governing law of the Credit Agreement (and, hence, the guarantees) is the law of the State of New York. Accordingly, The Mercantile Law Amendment Act (Manitoba) is not applicable.

40. The position of the Receiver is that it expects that New York law will provide for subrogation in a similar manner to Manitoba law, that is:

(a) a guarantor that pays a lender on account of the borrower pursuant to a guarantee is entitled to be subrogated to the lender's rights against that borrower, provided that the security was granted to the lender in respect of the same debt as that guaranteed; and

(b) If two or more guarantors make payments pursuant to their guaranteeing of the borrower's obligations and subsequently, by way of subrogation, realize cash from the borrower's security, that cash should be returned to the guarantors pro rata on the basis of their payments in respect of the guarantees.

41. NIP and NPL are both Guarantors and, accordingly, both would be entitled to be subrogated to the Lender's rights against the Borrowers under the Credit Agreement, effectively on a pro rata basis, based on the respective contributions of the proceeds of the disposition of their assets to repayment of the Credit Agreement debt.

42. Accordingly, in this case, by means of subrogation (when effective), both

NIP and NPL “inherit” the security of the Lenders as against the Inkster Property and the Broadway Property, to the extent of their respective contributions to repayment of the Credit Agreement debt.

43. Given that:

(a) NPL is indebted to NIP (and not the other way around);

(b) NEL (NPL’s parent) is indebted to NIP;

(c) NPL has no material arm’s length creditors other than the CRA;

(d) NEL has no other material creditors;

in the result, any benefit to NPL arising from subrogation rights would ultimately accrue to NIP.

The Receiver’s Authority to seek a Sale Approval and Vesting Order

44. The Respondents argue that the Receiver has exceeded its authority pursuant to the Receivership Order in entering into the Inkster Purchase Agreement and seeking the Inkster Approval and Vesting Order from this Honourable Court.

45. The Receivership Order provides as follows:

> **RECEIVER’S POWERS**
>
> 5. THIS COURT ORDERS that the Receiver is hereby authorized and directed to:
>
> …
>
> (b) market and pursue all offers for sales of the Business or Property, in whole or in part, which may include: (i) advertising and soliciting offers in respect of the Property, the Business or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in tis discretion deems appropriate; (ii)

soliciting proposals from third party liquidators; and (iii) engaging a real estate broker with respect to the sale of the Debtors' real property, subject to prior approval of this Court being obtained before any sale (except as permitted by paragraph 6(m)(i) below; …

RECEIVER'S PERMISSIVE POWERS

6. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated … to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary and desirable …

…

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements (including any amendments and modifications thereto) …

…

(m) to sell, convey, transfer, lease, or assign Property or any part or parts thereof out of the ordinary course of business,

(i) without approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with approval of this Court in respect of ay transaction in which the purchase price or aggregate purchase price exceeds the applicable amount set out in the preceding clause;

And in each such case notice subsection 59(10) of *The Personal Property Security Act* (Manitoba), subsection 134(1) of *The Real Property Act* (Manitoba) or any federal or provincial legislation shall not be required.

(n) to apply for vesting order or other orders necessary to convey the Property or any part or parts thereof to a

> purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
>
> …
>
> and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

46. As indicated in the Ninth Report, the Receiver has taken the following steps with respect to the Inkster Property:

(a) Marketed and pursued all offers for sale of the Inkster Property by:

(i) Advertising and soliciting offers in respect of the Inkster Property;

(ii) Engaging Colliers with respect to the sale of the Inkster Property

(iii) Negotiating such terms as the Receiver in its discretion deems reasonable with respect to the sale of the Inkster Property; and

(iv) Entering into the Inkster Purchase Agreement, which is conditional on receiving approval of this Honourable Court.

(b) Applied for the approval of the Inkster Purchase Agreement from this Honourable Court, as required pursuant to paragraph 6(m)(ii) of the Receivership Order; and

(c) Applied for a vesting order in order to convey the Inkster Property to the Purchaser free and clear of any liens or encumbrances affecting the Inkster Property.

47. The Receiver is expressly empowered and authorized to take all of the

steps it has taken with respect to the Inkster Property pursuant to the Receivership Order.

48. The suggestions by the Respondents that the Receiver acted improperly by continuing to negotiate terms of the Inkster Purchase Agreement, and applying for the Inkster Approval and Vesting Order after the Respondents brought a motion "to stop the sale of the Inkster Property" and discharge the Receiver is unsupported in the law. The suggestion that an objection by a Debtor, or any other stakeholder, to the sale of Property subject to the Receivership Order and/or a motion seeking the discharge of the Receiver somehow results in the Receivership Order being suspended until such a time as the Respondents' motion is heard is unsupported and impractical. If this argument were accepted it would render the paragraph empowering the Receiver to take steps with respect to the Property to the exclusion of all other Persons meaningless.

49. The Respondents are entitled to seek the discharge of the Receiver and/or contest the sale of the Property in these proceedings, however, the outcome of those motions are a matter for the Court to decide. There cannot be, in effect, automatic injunctive relief which would prevent a Receiver from taking any further steps with respect to the sale of Property, which is subject to court approval, on the basis that a party has filed a motion seeking the discharge of the Receiver and/or contesting the sale of Property.

The Court's Authority to make a Vesting Order

50. The authority of the Court to make a vesting order is captured in section 243 of the BIA and section 37(1) of the QB Act [Tab 5].

51. The Respondents rely on the case of *Third Eye Capital Corporation v*

Ressources Dianor Inc., 2019 ONCA 508 [*Third Eye*] [Tab 6], to argue that the Court does not have authority to vest title in the Purchaser.

52. *Third Eye* does not apply in the manner that the Respondent have argued it applies. NPL is not a "third party" to proceedings as described by the Respondents. NPL is a Debtor in these proceedings, a guarantor, and a debtor to NIP. NPL is not a third party with royalty interest in land.

53. Accordingly, NPL is a Debtor within the meaning of the Receivership Order, pursuant to which the Receiver is authorized and empowered to deal with the Debtors' Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of November, 2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: "G. Bruce Taylor"
G. Bruce Taylor / Ross A. McFadyen /
Mel M. LaBossiere
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

11

Discharge

1. Grounds
2. Court Appointment
3. Private Appointment
4. Refloating the Charge

1. GROUNDS

Once the receiver has achieved the goals of the receivership, principally the sale of the debtor's business or property and the distribution of the sale proceeds, the court in the case of a court appointment and the security holder in the case of a private appointment should terminate receiver's appointment and discharge the receiver.

The appointment of the receiver is usually terminated when the estate has been fully administered or the appointment no longer serves any purpose.[1] By that time, the receiver will have taken possession of and disposed of all the debtor's assets, property, and undertaking. Then, the receiver will have no other function, except in the case of a court appointment, to pass its accounts before being discharged. In a court appointment, the court terminates the appointment; it is not terminated automatically. The receiver then proceeds to pass its accounts and, if satisfactory, the court discharges the receiver. In a private appointment, the security holder may change or terminate the appointment of a receiver at will unless there is a prohibition in the security instrument.

There are many situations where a receiver may be discharged if the administration is not completed and another receiver appointed in its place to complete the receivership. In a court appointment, there is a heavier onus on the debtor or third party who seeks to discharge or replace a receiver in the course of the administration than there is upon a party opposing the court appointment in the first instance. The

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1 See *Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.* (1993), 79 B.C.L.R. (2d) 169, 1993 CarswellBC 125 (B.C. Master), appeal dismissed (1993), 1993 CarswellBC 1998 (B.C. S.C.), where the court dismissed an application to discharge the receiver as the receiver had not completed the administration of the estate, and, in particular, the receiver had not resolved warranty issues, obtained tax refunds, and disposed of some of the remaining units of a condominium project at the time of the application.

court considers the delay in bringing the motion, the stage of the proceedings as well as the increased costs in replacing a receiver during the course of administration.[2]

The court or security holder may discharge the receiver in the following situations:

(1) Where the administration has been fully completed.
(2) If there is a conflict of interest with the receiver.

A receiver ought not to continue the appointment if there is any apparent conflict of interest. For example, a receiver who accepts an appointment as trustee in bankruptcy or as trustee under a proposal pursuant to the *Bankruptcy and Insolvency Act* or *vice versa* has a conflict of interest if the creditors are challenging the security instrument under which the appointment was made as being defective, or if the creditors are challenging the enforcement thereof or that the taking of the security is preferential to other creditors.

However, the court may permit the receiver to take both positions if the creditors consent or the inspectors of the bankrupt estate approve the appointment. Even if there is no litigation involving the security, the court may permit the dual position if the major creditors consent or do not oppose, or, in the case of a bankruptcy, the inspectors of the estate consent.[3] In addition, if the receiver is in a conflict of interest position but has taken steps to resolve the conflict, the court will dismiss the application.[4]

In *Re YBM Magnex International Inc.*,[5] the court considered the following factors, acknowledging that there may be additional factors, in deciding whether to remove a receiver:

(a) the gravity of the conflict or potential conflict;
(b) the receiver's qualifications, and the experience and familiarity already gained by the receiver;
(c) the prejudice to the estate in removing the receiver, in particular, the knowledge which would be lost and the time and costs which would be incurred in substituting a new receiver and bringing that person up to speed;
(d) he receiver's conduct, in particular, whether the receiver: (i) has disclosed the conflict or potential conflict from the outset; (ii) has established measures to reduce the dangers of conflicts or potential conflicts; and (iii) has in any way acted improperly;
(e) delay by the applicant in alleging conflict and bringing the motion for removal;
(f) tactical reasons for bringing the motion for removal; and
(g) the wishes of various stakeholders.

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2 *Royal Bank of Canada v. Vista Homes Ltd.* (1985), 63 B.C.L.R. 366, 57 C.B.R. (N.S.) 80, 1985 CarswellBC 475 (B.C. S.C.); *Canada Trustco Mortgage Co. v. York-Trillium Dev. Group Ltd.* (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.); *Royal Bank of Canada v. Walker Hall Winery Ltd.* (2010), 2010 ONSC 4236 (CanLII), 2010 CarswellOnt 6025 (Ont. S.C.J. [Commercial List]).

3 See Chapter 12 "Bankruptcy and Receivership, 6. Conflict of Interest". See also sections 13.3 and 13.4 of the *Bankruptcy and Insolvency Act*.

4 *Re YBM Magnex International Inc.* (2000), 275 A.R. 352, 9 B.L.R. (3d) 296, 2000 CarswellAlta 1068 (Alta. Q.B.), appeal dismissed (2001), 293 A.R. 337, 23 B.L.R. (3d) 293, 257 W.A.C. 337 (Alta. C.A.).

5 Above. With respect to factor (a), the court considered (i) the existence of the conflict; (ii) the alleged favouritism by the receiver; (iii) the nature of the conflict for auditors affiliated with receivers; and (iv) the conclusion on the nature of the conflict.

(3) If the receiver has breached its duties or has not diligently fulfilled the powers entrusted to it by the court order or in enforcing the rights of the security holder.[6]
(4) If the receiver is negligent or incompetent.[7]

Needless to say, the receiver will not be discharged for minor breaches. The court or the security holder must assess the nature of the breach and the consequences in terms of the receiver's duties and powers and their effect on the debtor and other interested persons. The court reviews the receiver's actions as they unfold, rather than reviewing its actions with the benefit of hindsight.[8]

(5) If the receiver dies, is dissolved, or becomes insolvent.
(6) If there are sufficient facts to show partiality and bias.
(7) If the receiver is dishonest or fraudulent.
(8) If after the appointment, there appears to be no reason or purpose to continue with the receivership as, for example, there are no substantial assets to administer or where the estate would be better administered under the *Bankruptcy and Insolvency Act*.[9]

In *Kotler et al. v. Bayshore Investments Ltd. et al.*,[10] the court discharged the receiver on the basis that the costs of the receivership would lead to a dissipation instead of a preservation of assets.

However, in conflicts between the security holder and the debtor as to who should be the receiver, the court considers the fact the debtor is suing the receiver, the nature of the claims being made against the receiver and the costs to be incurred in substituting a new receiver.[11] In *Prince Albert Fashion Bin et al. v. Prince Albert Credit Union Ltd. et al.*[12] the debenture holder appointed a private receiver who allegedly was selling the debtor's inventory at less than cost. The debtor sued the debenture holder and receiver for damages, obtained an *ex parte* injunction and then

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6 In *Investors Group Trust Co. Ltd. v. Nussbaumer* (1980), 25 B.C.L.R. 133, 1980 CarswellBC 339 (B.C. S.C.), the receiver improperly performed her duties in a mortgage receivership. She failed to take prompt action to find tenants for the properties and took no steps to renegotiate any leases. In view of the fact that the mortgage was going to be redeemed within a short period of time, the court dismissed the application to discharge the receiver.

7 See *Aquilon Capital Corp. v. Sucor* (2010), 357 N.B.R. (2d) 336, 67 C.B.R. (5th) 288, 923 A.P.R. 336 (N.B. Q.B.), where if the privately appointed receiver is acting in good faith and is commercially reasonable in the sale of the debtor's assets, the court will not substitute the receiver or enjoin the receiver from selling.

8 *Canada Trustco Mortgage Co. v. York-Trillium Dev. Group Ltd.* (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.).

9 In *Re United Maritime Fishermen Co-op* (1988), 87 N.B.R. (2d) 333, 68 C.B.R. (N.S.) 170, 221 A.P.R. 333 (N.B. Q.B.), appeal allowed (1988), 88 N.B.R. (2d) 253, 69 C.B.R. (N.S.) 161, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (N.B. C.A.), the court terminated a receivership where the re-structuring of the debtor appeared no longer feasible so that a trustee in bankruptcy could better serve the creditors and sell the assets without the court.

10 (1982), 41 C.B.R. (N.S.) 223, 1982 CarswellBC 482 (B.C. S.C.), reversed (1982), 42 C.B.R. (N.S.) 127, 1982 CarswellBC 484 (B.C. C.A.).

11 *Royal Bank of Canada v. Vista Homes Ltd.* (1985), 63 B.C.L.R. 366, 57 C.B.R. (N.S.) 80, 1985 CarswellBC 475 (B.C. S.C.).

12 (1980), 37 C.B.R. (N.S.) 160, 1980 CarswellSask 30 (Sask. Q.B.).

applied to substitute a court-appointed receiver for the privately appointed receiver. Although the court refused to substitute the receiver on the grounds that the added cost did not justify another receiver, the court imposed a condition on the privately appointed receiver not to sell below cost without an order of the court or the consent of the debtor.

(9) If a prior encumbrancer appoints its own receiver or applies to the court in a court-appointed receivership for a receiver.[13]

(10) If the receiver requests its own removal where, for example, the receiver is a natural person and is ill or becomes incapable of fulfilling the duties of a receiver.

(11) If the court appoints a receiver, the appointment of a privately appointed receiver is terminated.[14]

(12) If the debtor challenges the validity of the appointment,[15] if a creditor alleges that the security instrument under which the receiver was appointed was a fraudulent conveyance,[16] or if the security holder does not post security pursuant to the order.

(13) If the receiver is in constant conflict with the debtor such that the evidence leaves little doubt that the receiver cannot remain impartial and disinterested.[17]

(14) In a mortgage receivership, if the mortgagee obtains a Rice order,[18] or purchases the property, the effect is to terminate the appointment of the receiver subject to the passing of accounts.[19]

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13 *Imperial Life Assur. Co. v. Glenburn Mtge. Ltd. et al.* (1978), 28 C.B.R. (N.S.) 302, [1979] 1 W.W.R. 245, 1978 CarswellBC 298 (B.C. S.C.), following *Re Metro. Amalg. Estates Ltd.; Fairweather v. The Company*, [1912] 2 Ch. 497 (Eng. Ch. Div.).

14 *Re Slogger Automatic Feeder Co.; Hoare v. Slogger Automatic Feeder Co.*, [1915] 1 Ch. 478 (Eng. Ch. Div.). If the order appointing the receiver is being appealed, the security holder cannot resort to the powers under the instrument in order to sell: *Price Waterhouse Ltd. v. Creighton Holdings Ltd. et al.* (1984), 36 Sask. R. 292, 54 C.B.R. (N.S.) 116, 1984 CarswellSask 39 (Sask. Q.B.).

15 *Mercantile Bank of Can. v. Nelco. Corp.* (1982), 47 C.B.R. (N.S.) 165, 1982 CarswellAlta 332 (Alta. Q.B.).

16 *Royal Bank v. First Pioneer Invts. Ltd. et al.* (1979), 27 O.R. (2d) 352, 32 C.B.R. (N.S.) 280, 106 D.L.R. (3d) 330 (Ont. H.C.), appeal dismissed (1981), 32 O.R. (2d) 121, 39 C.B.R. (N.S.) 147, 121 D.L.R. (3d) 510 (Ont. C.A.), appeal allowed [1984] 2 S.C.R. 125, 5 O.A.C. 195, 52 C.B.R. (N.S.) 225 (S.C.C.).

17 *First Pac. Credit Union v. Grimwood Sports Inc. et al.* (1984), 59 B.C.L.R. 145, 16 D.L.R. (4th) 181, 56 C.B.R. (N.S.) 7 (B.C. C.A.).

In *Azura Management (Hemlock) Corp. v. Hemlock Valley Resorts Inc.* (2006), 22 C.B.R. (5th) 60, 2006 BCSC 824 (CanLII), 2006 CarswellBC 1264 (B.C. Master), where the court dismissed the receiver's motion to approve the sale of the debtor's business, the court also discharged the receiver and substituted another. Here, the receiver's sale price was low, the sale was not in the best interests of the majority of interested parties, and the receiver allowed insufficient time to market the assets so as to create a proper climate to generate offers more closely akin to the fair market value of the property.

18 In Alberta, a Rice order is an order directing a judicial sale in favour of the creditor and granting judgment for the deficiency. See *Morguard Investments Ltd. v. De Savoye* (1988), 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650, 29 C.P.C. (2d) 52 (B.C. C.A.), appeal dismissed [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160, [1991] 2 W.W.R. 217 (S.C.C.).

19 *Tow-Mor Properties Ltd. v. W.G. Fahlman Ent. Ltd.* (1986), 72 A.R. 81, 62 C.B.R. (N.S.) 297, 1986 CanLII 1907 (Alta. Master).

If the receiver's appointment is terminated before the administration of the estate is completed, the receiver must pass on the balance of the assets and proceeds to the successor receiver, if any, as soon as possible. The terminated receiver remains liable for its actions and will of course have the duty to account fully to the court, to the debtor, to the security holder, and to all other stakeholders. The successor receiver ought to be appointed immediately in order to provide continuity in the administration. If there is any appreciable lapse of time before a successor is appointed, it may be necessary for the security holder to move for a restraining order against the debtor.

In the case where a successor receiver is not appointed, the security holder may have to pursue other remedies that are available such as foreclosing or simply suing for arrears. If the security holder does nothing, the receiver nonetheless remains accountable for its conduct and activities. The receiver must return the debtor's property to the debtor at which time the powers of the directors and officers of the debtor corporation are restored.[20]

On the other hand, if the receiver has successfully managed the debtor's business to the extent of retiring the debt to the security holder, the receiver ought not to continue operating the business. The receiver will be without authority and therefore, notwithstanding its good intentions, the receiver may become a trespasser and liable for damages. The receiver remains accountable and becomes a fiduciary until the time when the receiver returns the business to the debtor.[21]

2. COURT APPOINTMENT

In most cases, a court-appointed receiver proceeds to administer the estate in receivership until completion. Thereafter the security holder can move for an order terminating the appointment and requiring the passing of the receiver's final accounts. However, there are situations where the receivership may be substituted or terminated earlier than by completion. Once the court terminates the appointment, the receiver then passes its accounts while the successor receiver continues with administration. The terminated receiver retains the right to apply to the court under the original order for directions.[22] When the accounts are passed, the receiver obtains an order of discharge. Usually, throughout the receivership, the receiver reports periodically to the court on the stage of the administration and at the same time requests that its conduct and activities be approved to date. The discharge order then protects the receiver from claims for maladministration and any disputes as to the validity of the appointment especially when it is on consent.[23] The order, however, does not protect the court-appointed receiver for gross negligence or wilful misconduct. If the debtor or other creditor wishes to pursue the receiver after its discharge for gross negligence or wilful misconduct, the debtor should post a full indemnity

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20 See below, "4. Refloating the Charge".

21 See *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (Eng. Ch. Div.), appeal dismissed [1897] A.C. 180 (U.K. H.L.).

22 *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*, [1992] 3 W.W.R. 106 at p. 115 (Sask. C.A.).

23 *Re Abacus Cities Ltd.*, [1986] 4 W.W.R. 564, 45 Alta. L.R. (2d) 113, 70 A.R. 55 (Alta. C.A.), leave to appeal refused (1986), 69 N.R. 240 (S.C.C.).

to protect the receiver in the event the claim is dismissed. Such an indemnity can be a payment into court or more conveniently by a letter of credit.[24]

The parties to the receivership action may settle or otherwise provide security to the court's satisfaction, thereby rendering the position of the receiver ineffective or unnecessary. Similarly if the costs of a continued receivership may lead to a dissipation of assets, the court may consider terminating the receivership where there is no likely benefit to be derived for the stakeholders.[25]

In the situation where the receiver may be substituted or replaced, the receiver must continue to act honestly and in good faith and the receiver should deal with the property in a commercially reasonable manner. Where the debtor or other stakeholders allege acts of impropriety, the court has the inherent power to remove its own officer and substitute another in its place prior to the completion of the administration.

If the debtor or a creditor brings a motion for the receiver's termination for cause, the court requires that the receiver report to the court as to the status of the administration in a timely manner. If the receiver does not present an accurate account and a record of receipts and disbursements, the court cannot assess the receiver's remuneration let alone order the discharge.[26]

On the motion for termination and discharge, the security holder and receiver should give notice to all defendants or respondents in the action and to all interested persons.[27] In many cases, only the debtor and guarantors are the defendants, although, depending upon the practice in the particular court, subordinate security holders and execution creditors may have been added as parties if they have not been paid.

The motion to discharge the receiver should be relatively straightforward when the administration has been completed since all the proceedings in the realization of assets will have been finalized, including the passing of the receiver's accounts and taxation. Persons having an interest in the debtor's equity have already had an opportunity to contest the sale proceedings and challenge the receiver's accounts. The court is reluctant to keep the administration open where all issues have been dealt with, except for possible potential claims against the estate or the receiver. In this case, the court analyzes whether such claims are sufficiently remote and hypothetical so that the administration can be finalized.[28] Thus, the motion to discharge the receiver is, in most instances, merely a house-keeping measure in the finalization of the lawsuit and relieves the receiver of any further obligations. The motion may also be a motion for advice and directions on the distribution of the sale proceeds. How-

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24 *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, 2009 CanLII 55113, 2009 CarswellOnt 6167, [2009] O.J. No. 4265 (Ont. S.C.J. [Commercial List]).

25 See *Kotler et al. v. Bayshore Invts. Ltd. et al.* (1982), 41 C.B.R. (N.S.) 223, 1982 CarswellBC 482 (B.C. S.C.), appeal allowed on other grounds (1982), 42 C.B.R. (N.S.) 127, 1982 CarswellBC 484 (B.C. C.A.). See above "1. Grounds".

26 *Guar. Trust Co. of Can. v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd. et al.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90, 1982 CanLII 1100 (Alta. Q.B.).

27 The purchaser of assets from the receiver has standing on such a motion where the purchaser has potential liability: *Bank of Montreal v. Probe Explorations Inc.* (2006), 26 C.B.R. (5th) 183, 2006 ABQB 604 (CanLII), 2006 CarswellAlta 1446 (Alta. Q.B.).

28 *Bank of Montreal v. Probe Explorations Inc.* (2006), 26 C.B.R. (5th) 183, 2006 ABQB 604 (CanLII), 2006 CarswellAlta 1446 (Alta. Q.B.).

ever, if the receiver has not taken all reasonable steps to realize the assets, the court may adjourn the motion pending finalization of the estate.[29]

Once the receiver completes the administration, the security holder may then proceed to obtain the receiver's discharge or an order granting the discharge on a fixed date or on the completion of the administration. Where security is posted for the receiver's performance, the receiver's surety will not, however, be discharged until such time as the receiver passes the final accounts and taxes its remuneration.

If the receiver has assets which are unrealizable, as, for example, books and records, the court will direct that the assets be returned to the debtor subject to the security holder's charge if the debt has not been fully satisfied. Where the holder has been repaid, the receiver must deliver such surplus assets and proceeds from realization to any subordinate security holder, the debtor, or the trustee in bankruptcy as the case may be.

As indicated above, the court usually grants the receiver's fees and expenses on a full indemnity basis where the receiver can establish entitlement through dockets and expenses receipts. In addition, where the debtor or other stakeholders challenge the receiver's conduct and activities, the receiver is usually entitled to the full indemnity as well. If the debtor or creditors unsuccessfully attack the receiver for claims of negligence, breach of fiduciary duty, dereliction of duty, abuse of power, or bad faith, the court has the inherent discretion to award full or substantial indemnity costs against the challenger especially where the facts have been litigated in previous proceedings.[30] The court can award costs on a full or substantial indemnity basis where the party can show reprehensible, scandalous, or egregious conduct. Similarly, if the receiver's reputation and integrity are being attacked, the court can award costs against the other party and even against a non-party if unsuccessful.[31]

3. PRIVATE APPOINTMENT

After the receiver disposes the debtor's property, the receiver normally prepares a statement of receipts and disbursements for the security holder and, if requested or required by statute, for the debtor and creditors. Such a statement is needed if the security holder intends to pursue a deficiency balance against the debtor or against any guarantor.

If the receiver does not produce a statement of receipts and disbursements, the debtor can commence a common law cause of action against the security holder for a detailed accounting with respect to the property taken and realized. In addition, the receiver is usually deemed to be the agent of the debtor, and as agent of the

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29 *Re Atlantic Travel Service Ltd.* (1982), 44 C.B.R. (N.S.) 218, 1982 CarswellBC 502 (B.C. S.C.).

30 *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2007), 31 C.B.R. (5th) 167, 2007 ONCA 145 (CanLII), 2007 CarswellOnt 1182 (Ont. C.A.); *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), (sub nom. *Bricore Land Group Ltd., Re*) 299 Sask. R. 194, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.), allowing an appeal from (2007), (sub nom. *Bricore Land Group Ltd., Re*) 298 Sask. R. 158, 33 C.B.R. (5th) 46, 2007 SKQB 144 (CanLII) (Sask. Q.B.) with respect to costs where bad faith was not alleged.

31 *Re Party City Ltd.* (2002), 32 C.B.R. (4th) 286, 20 C.P.C. (5th) 156, 2002 CarswellOnt 1116 (Ont. S.C.J. [Commercial List]).

receiver should therefore be accountable. Moreover, the receiver must be in a position to account to others who are entitled to any surplus.[32]

Where the receiver cannot realize an asset, the receiver may return it to the debtor subject to the charge. If the debtor subsequently realizes upon the asset, the holder may enforce its judgment, if any, or re-enforce its security to the extent of any deficiency balance owing.

Upon completion of the administration, the receiver pays out the net proceeds of realization to the security holder. Although the practice is not uniform, the security holder may formally notify the receiver in writing of the termination of the receivership which will end the agency relationship. The notice takes effect when it is given to the receiver even though it may be dated and executed earlier.[33]

If the security holder terminates the appointment of the receiver before completion of the administration, the receiver remains liable to the security holder and to the debtor for its conduct and activities to the date of termination. If a successor receiver is appointed in its place, the security holder directs the first receiver to turn over the files to the second receiver.

Unlike court-appointed receiverships, it is not usually clear when the receivership has been fully administered. Although the receiver may have realized upon the assets and disbursed the proceeds, there is no finality. From time to time, unresolved problems may arise for which the receiver may be responsible. In such cases, the receiver may request indemnification from the security holder initially upon appointment or prior to distribution. An indemnity from an insolvent debtor is worthless.

If the receiver has retired the amounts owing under the security, the receiver is not *pro tanto* discharged notwithstanding that the security holder has been paid in full. The receiver stands charged with the duty to account for the surplus to the debtor and, in this respect, the receiver becomes a fiduciary.[34] If the receiver is aware of competing claims or subsequent security holders of the debtor, the receiver may pay such surplus into court by way of interpleading. Alternatively, the receiver may pay a subsequent security holder upon obtaining a proper indemnity.

If the receiver has realized sufficient proceeds to retire the debt to the security holder together with the remuneration, costs, charges, and expenses, the receiver must deliver up the surplus and any unrealizable assets, subject to the rights of subordinate creditors, to the debtor as soon as possible. In some cases, this may occur before the receiver has completed its administration. If the receiver retains such proceeds and assets for an unreasonable period of time irrespective of whether the receiver has been terminated, both the receiver and the security holder may be liable for trespass and conversion.[35] If the receiver has been terminated, then the security holder might escape liability depending upon when the notice of termination had been given.

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32 *Re B. Johnson & Co. (Bldrs.) Ltd.*, [1955] 1 Ch. 634, [1955] 2 All E. R. 775, [1955] 3 W.L.R. 269 (Eng. C.A.), followed in *Smiths Ltd. v. Middleton*, [1979] 3 All E.R. 842 (Ch. Div.).

33 See *Windsor Refrigerator Co. v. Branch Nominees Ltd.* (1960), [1961] Ch. 375, [1961] 1 All E.R. 277 (Eng. C.A.), where by analogy the appointment took effect from the time it was communicated.

34 *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (Eng. Ch. Div.), appeal dismissed [1897] A.C. 180 (U.K. H.L.).

35 See *Re Goldburg (No. 2); Ex parte Page*, [1912] 1 K.B. 606 (K.B.).

KERR AND HUNTER

on

RECEIVERS AND ADMINISTRATORS

EIGHTEENTH EDITION

BY

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CHAPTER 12

DISCHARGE OF A RECEIVER

12–1 As already stated,[1] the rules regulating the appointment and control of receivers by the court have been substantially amended and codified, by new Rules, CPR 69 and CPR PD 69, revoking and replacing RSC Ord.30, with effect from December 2, 2002, with respect to proceedings commenced on or after that date.[2] The new rules relating to the discharge of receivers are as follows.

The court is now empowered to discharge a receiver, or to terminate his appointment, at any time, and to appoint another receiver in his place.[3] In particular, at the commencement of his appointment, the court may terminate it, if he fails, by the date specified, to give the security which the court has required, or to satisfy the court as to the security which he has in force.[4]

His appointment may also be terminated, if he is proved to have failed to comply with any rule, practice direction or direction of the court.[5]

When the court is discharging a receiver, or terminating his appointment, the court may require him to pay into court any money held by him, or to specify the person (*e.g.* his successor), to whom he must pay over any money, or to transfer any assets still in his possession,[6] and to make provision for the discharge or cancellation of any guarantee given by him as security.[7]

The receiver, or any party to the proceeding, may apply to the court for the receiver to be discharged on completion of his duties.[8]

12–2 **The case law.** The case law on these subjects, as analysed by Sir Raymond Walton, as slightly abridged, has been printed below. Despite the updating of the rules, the principles applicable will no doubt remain much the same.

12–3 **On his own application.** Unless the minutes of the order appointing or continuing a receiver, or a receiver and manager, contain a provision for his discharge,[9] an application to the court is necessary, in order to divest his

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[1] See Ch.5, above.
[2] Civil Procedure (Amendment) Rules, 2002 (SI 2002/2058, rr.2, 26, and Sch.7.
[3] CPR 69.3.
[4] CPR 69.5(2). Under the former rules, if he did not complete the security by the date specified, his appointment terminated.
[5] CPR 69.9(1).
[6] CPR 69.11(1)(a).
[7] CPR 69.11(1)(c).
[8] Insolvency 1986, s.45(1); CPR 69.10.
[9] *Day v Sykes, Walkers & Co.* (1886) 55 L.T. 733; [1886] W.N. 209.

possession.[10] The appointment of a receiver, made previously to the judgment in the action, will not be superseded by the judgment, unless the receiver is appointed only until judgment or further order.[11] But an order to put a purchaser into possession is in itself a discharge of a previous order for a receiver as to the lands mentioned in the subsequent order.[12]

As a general rule, where a receiver has been appointed and has given security, he will not be discharged upon his application, before he has completed his duties, without showing some reasonable cause why he should put the parties to the expenses of a change,[13] otherwise he may have to pay the costs of his removal and of the appointment of his successor. If, however, he can show reasonable cause for his discharge, such as ill-health, he may be discharged and allowed to deduct the costs of and incidental to the application for discharge out of any balance in his hands.[14] As an alternative, if his indisposition be only temporary, he may obtain the leave of the court to appoint an attorney for a limited period.

A manager may find himself in a situation where, without the whole-hearted co-operation of some party to the action, which is not forthcoming and cannot be privately compelled, he is unable to function effectively as a manager. In these circumstances, it is proper for him to apply in the alternative to be discharged, or to have his functions restricted to those which it is possible for him to carry out.[15]

Similarly, if there proves to be no advantage in continuing to carry on a business, either because it cannot be run at a profit, or because the possible profits do not justify the expenses of managing it, the manager, may, and indeed should, make a similar application.[16]

A receiver ought not to make an application for discharge to come on with the further consideration of the action; for the court can, on the further consideration, discharge him without such an application. Accordingly, the costs of a separate application for discharge have been refused.[17]

12–4 On satisfaction of incumbrance. A receiver is generally continued until judgment in the action in which he has been appointed; but, if the right of the claimant ceases before that time, the receiver will be discharged at once.[18] But where the appointment is made in a foreclosure action at the instance of a claimant who is subsequently paid off, another incumbrancer may, on application, obtain leave to be added as claimant, in which case the

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[10] *Thomas v Brigstocke* (1827) 4 Russ. 64; see now CPR 69.10.
[11] See para.5–40, above.
[12] *Ponsonby v Ponsonby* (1825) 1 Hog. 321; *Anon.* (1839) 2 Ir. Eq. R. 416.
[13] *Smith v Vaughan* (1744) Ridg. temp. Hard. 251; *cf. Cox v M'Namara* (1847) 11 Ir. Eq. R. 356.
[14] *Richardson v Ward* (1822) 6 Madd. 266.
[15] *Parsons v Mather & Platt Ltd*, unreported, December 9, 1974, CA (Appeal Court Judgments (Civil Division) No.392A), where (in effect) the manager was relieved of his management duties and restricted to those of a pure receivership.
[16] See *e.g.* the master's order in *Fillippi v Antoniazzi* (1976) R. 2251 unreported of November 1, 1977, directing that the receiver and manager be at liberty to cease trading forthwith at the premises of the partnership business.
[17] *Stilwell v Mellersh* (1851) 20 L.J. Ch. 356.
[18] *Davis v Duke of Marlborough* (1818) 2 Swan. 108.

receivership may be continued.[19] Similarly, if a receiver is appointed for the purpose of satisfying a number of claims, he will not be discharged merely on the application of a satisfied claimant, if some of the other claims are still outstanding.[20] Proceedings may always be stayed without prejudice to the receivership.[21]

Continuance becoming unnecessary. If, in the course of the proceedings, the continuance of a receiver becomes unnecessary, he will be discharged. Thus, where a receiver had been appointed in consequence of the misconduct and incapacity of trustees under a will, he was ordered to be discharged on the appointment of new trustees.[22] Again, where a receiver, who had been appointed in consequence of the executors of a testator's will having refused to act, moved away from the vicinity of the estates over which he had been appointed receiver, the court, on the consent of the other parties, and the executors expressing their willingness to act, made an order that the receiver should pass his accounts.[23] A receiver will be discharged, when the object of his appointment has been fully effected,[24] as, for instance, when arrears of annuity, to obtain which he was appointed, have been paid.[25] **12–5**

Other causes for discharge. A receiver is liable to be discharged for irregularity in carrying in his accounts, for conduct making it necessary to take proceedings to compel him to do so, and for so submitting his accounts that the amount of the balance in his hands cannot be ascertained.[26] So also, if his conduct has been such as to impede the impartial course of justice,[27] or to amount to a gross dereliction of duty,[28] or if his appointment as a receiver has been improper.[29] **12–6**

It is conceived, however, that a charge of misbehaviour against a receiver, for suffering the owner of an estate, over which the receiver was appointed, to remain in part possession of it to the prejudice of the estate, will not be regarded by the court as a sufficient reason for discharging the receiver, for in such a case the parties themselves have caused the loss, by not compelling the owner, by the authority of the court, to deliver up possession to the receiver.[30]

Where a receiver becomes bankrupt, he will be discharged, and another receiver appointed.[31]

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[19] See *Munster, etc., Bank v Mackey* [1917] 1 Ir.R. 49.
[20] *Largan v Bowen* (1803) 1 Sch. & Lef. 296.
[21] *Damer v Lord Portarlington* (1846) 2 Ph. 34; *Paynter v Carew* (1854) 18 Jur. 417; *Murrough v French* (1827) 2 Moll. 497.
[22] *Bainbrigge v Blair* (1841) 3 Beav. 421, 423. It is otherwise where, on the appointment of new trustees, there are questions still outstanding: See *Reeves v Neville* (1862) 10 W.R. 335.
[23] *Davy v Gronow* (1845) 14 L.J. Ch. 134.
[24] *Tewart v Lawson* (1874) L.R. 18 Eq. 490. See, too, *Hoskins v Campbell* [1869] W.N. 59.
[25] *Braham v Lord Strathmore* (1844) 8 Jur. 567.
[26] *Bertie v Lord Abingdon* (1845) 8 Beav. 53.
[27] *Mitchell v Condy* [1873] W.N. 232.
[28] *Re St. George's Estate* (1887) 19 L.R. Ir. 566.
[29] *Re Lloyd* (1879) 12 Ch. D. 447; *Nieman v Nieman* (1889) 43 Ch. D. 198; *Re Wells* (1890) 45 Ch. D. 569; *Brenan v Morrissey* (1890) 26 L.R. Ir. 618.
[30] *Griffith v Griffith* (1751) 2 Ves.Sen. 400.
[31] *Daniell's Chancery Practice* (8th ed.), p.1479.

If a receiver has been wrongly appointed over property belonging to a person who is not a party to the action, he will be discharged, even though there has been an abatement of the claim by the death of a sole defendant.[32]

The court will discharge a receiver upon the application of a prior mortgagee who demands to go into possession as such by himself or by his receiver.[33]

Where a receiver had been appointed in an administration suit, another person, who was willing to act at a lower salary, was ordered to be substituted for him, as receiver, on the application of a mortgagee of a tenant for life of the property.[34]

12–7 Property to be sold. Where estates, over which a receiver has been appointed, have been ordered to be sold, the receiver will be continued, until completion of the sale, in order that he may collect any arrears of rent.[35]

12–8 Balance due to receiver. The receiver of an estate will not be discharged until he has received from the estate any balance found due to him on passing his accounts.[36] In administration actions, a receiver may be discharged on passing his accounts, and be paid his remuneration and costs, without waiting to see whether the estate is sufficient to pay all costs payable out of it.[37]

12–9 Application of one party only. A receiver, being appointed for the benefit of all the parties interested, will not be discharged on the application of that party only at whose instance he was appointed.[38]

12–10 Mode of application to discharge. The application to discharge a receiver appointed in a claim should be made by application notice[39]; the direction for his discharge may be given in the judgment at the trial, or in the order upon further consideration.[40]

In the Queen's Bench Division, an application to discharge a receiver is made to the master by application notice,[41] which may be issued before or after submission of the receiver's final account. In the former case, the order is made, subject to the receiver complying with the usual Central Office regulations; in the latter, on production of the master's certificate, and proof that the receiver has complied with the directions therein.

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[32] *Lavender v Lavender* (1875) 9 Ir.R.Eq. 593.
[33] *Re Metropolitan Amalgamated Estates* [1912] 2 Ch. 497; above, para.2–27.
[34] *Stanley v Coulthurst* (1868) W.N. 305.
[35] See *Quin v Holland* (1745) Ridg. temp. Hard. 295.
[36] *Bertrand v Davies* (1862) 3 Beav. 436.
[37] *Batten v Wedgwood, etc., Co.* (1885) 28 Ch. D. 317.
[38] *Davis v Duke of Marlborough* (1812) 2 Swans. 108; *Bainbrigge v Blair* (1814) 3 Beav. 421, 423.
[39] *Atkin's Court Forms*, Vol.33 (1981 Issue), p.247; forms of order, *Seton* (7th ed.), p.781; see also Palmer's *Company Precedents* (16th ed.), Vol.III, Chap.69.
[40] *Seton* (7th ed.), pp.781, 782.
[41] See now CPR 69.10.

Where, under the former procedure, a bond has been given up on application at the General Filing Department, it will be delivered up on production of the master's order: see below.

Service and appearance. An application for the discharge of a receiver should be served on all the parties.[42] The service of it on the receiver should be personal, and such service will not be dispensed with, unless an order for substituted service is obtained.[43] But a receiver, though served, is not entitled to appear at the hearing of the application, unless some personal charge is made against him. If he appears, he will not be allowed the costs of his appearance,[44] except under special circumstances.[45] **12–11**

Form of order on discharge. If the receiver has not submitted his final account, nor paid over any balance shown thereby, or determined after examination to be due from him, the order discharging him will direct him to do so. **12–12**

The order of discharge may be conditional on the performance of some act by the receiver, or be otherwise contingent on some future event. On proper evidence of compliance or of the happening of the event, the master will indorse on the order a direction that any guarantee given by the receiver is to be cancelled. On production of the order in the Filing Department, Central Office, the guarantee is indorsed with the vacating note and delivered to the solicitor against his receipt.[46]

Effect of discharge. The court has power, by making an order for release and discharge, to protect the receiver from all liability for acts done in the court of his duties. This power should not be exercised without the court first investigating, or making provision for the investigation of, claims of which the court has notice. But the court is not obliged to wait until the end of the limitation period, before protecting its officer against such a claim, if the claimant, having had ample opportunity to do so, neglects to prosecute any claim.[47] **12–13**

Notice to surety. Under the usual form of guarantee, the receiver is bound to give to the surety by post notice of his discharge: and within seven days thereafter, send the surety an office copy of the order discharging him. **12–14**

In an Irish case, in which a receiver was discharged owing to gross dereliction of duty, the order discharging him disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of the appointment of his successor.[48]

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[42] *Daniell's Chancery Practice* (8th ed.), p.1499.
[43] *Att.-Gen. v Haberdasher's Company* (1838) 2 Jr. 915.
[44] *Herman v Dunbar* (1857) 23 Beav. 312.
[45] *General Share Co. v Wetley Brick Co.* (1882) 20 Ch. D. 260, 267.
[46] CPR 69.11. This does not arise, where the receiver is a licensed insolvency practitioner and is covered by continuous security.
[47] *IRC v Hoogstraten* [1984] 3 W.L.R. 933, at p.944H.
[48] *Re St. George's Estate* [1887] 19 L.R. Ir. 566.

IN COMPANY CASES

12–15 Administrative receivers; vacation of office. There are now special rules dealing with the vacation of office by administrative receivers.[49] Such a receiver must forthwith vacate office, if he ceases to be qualified to act as an insolvency practitioner in relation to the company.[50] Where he vacates office at any time, his remuneration, and any expenses properly incurred by him, and any indemnity to which he is entitled out of the assets of the company, will be charged on and paid out of any property of the company which is in his custody or under his control at that time, in priority to any security held by the person by or on whose behalf he was appointed.[51]

12–16 Resignation of administrative receiver. When an administrative receiver proposes to resign, he must give *at least seven days' notice,* stating the date when he intends his resignation to take effect, to (i) his appointor, (ii) the company, or, if it be in liquidation, the liquidator, and (iii) to the members of the creditors' committee, if any.[52] No such notice is, however, required if he resigns in consequence of the making of an administration order.[53] If the receiver dies in office, his appointor must, *forthwith on becoming aware of the death,* give notice to the same persons.[54] The making of an order does not itself terminate his appointment; but since an order can only be made, where an administrative receiver is in office, with the consent of his appointor,[55] his resignation will necessarily follow.

Where an administrative receiver vacates office on completion of his receivership, or by resignation, or by virtue of having ceased to be qualified as an insolvency practitioner, he must *within 14 days* give notice to the registrar of companies,[56] and *forthwith give notice* to the company or its liquidator, and to the members of the creditors' committee (if any).[57]

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[49] An administrative receiver may now only be removed by the court: Insolvency Act 1986, s.45(1).

[50] Insolvency Act 1986, ss.45(2), 62(2): for the meaning of "insolvency practitioner qualified to act in relation to the company," para.4–7, above.

[51] Insolvency Act, 45(3).

[52] Insolvency Rules 1986, r.3.34(1), (2).

[53] *ibid.,* r.3.33(3). See Ch.14, below, s.1.

[54] *ibid.,* r.3.34(1).

[55] Insolvency Act 1986, Sch.B1, para.15(1)(b).

[56] Insolvency Rules 1986, r.3.35(1), (2).

[57] Insolvency Act 1986, s.45(4); Insolvency Rules 1986 (SI 1986/1925) r.3.35(2): notice may be given by the individual by indorsement, on the notice given of his cessation, to the register of charges: Insolvency Act 1986, s.48—Companies Act 1985, s.405(2); Insolvency Rules 1986, r.3.35(4).

CHAPTER 26

TERMINATION OF ADMINISTRATIVE RECEIVERSHIP

26–1 Displacement of the receiver: general. A receiver appointed by the debenture-holders may, if the court thinks fit, be displaced by the court (but only by the court), on the application of other debenture-holders, or of the appointor, in favour of its own receiver. A receiver appointed by or on behalf of subsequent debenture-holders will be displaced by the appointment of a receiver by or on behalf of prior debenture-holders.[1–2] On the making of an administration order,[3] or the extra-judicial appointment of an administrator and its taking effect, any administrative receiver[4] of the company must vacate office[5]; and any receiver of part of the company's property must vacate office, on being required to do so by the administrator.[6]

26–2 Removal. Just as his appointment takes effect only when communicated to the receiver, so also (in the absence of any special provision) notice of removal, under a power to remove, is effective only when received by him.[7] To the extent to which it is his duty to have paid preferential debts, a receiver who is removed from office must ensure that these are discharged, or that he retains sufficient assets in his hands to meet them, before he parts with the assets. Alternatively (see below), his removal may be accompanied by another appointment, under such circumstances that the receivership may properly be regarded as continuous, in which case he will be justified in transferring the whole of the assets in his hands, save as mentioned below, to the new receiver. If he does not either ensure payment of the preferential debts, or else that the receivership may properly be regarded as continuous, he will be personally liable to any disappointed preferential creditor whose debt he ought to have discharged.[8]

Having regard to the personal liability imposed upon all receivers by statute in respect of their own contracts (save in so far as such contracts

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[1] [2] *Re Maskelyne British Typewriter Co.* [1898] 1 Ch. 133; *Re Slogger Automatic Feeder Co.* [1915] 1 Ch. 478.

[3] See Chap.14 above.

[4] See, as to appointments of administrators, judicial or extra-judicial, Pt III, above.

[5] For the meaning of "administrative receiver", see para.21–1.

[6] Formerly, Insolvency Act 1986 Pt II, s.11(1)(b) (repealed): now, since the Enterprise Act 2002, Pt 10, see Insolvency Act 1986, Sch.B1, para.41(1).

[7] n.6, above para.41(2).

[8] *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] Ch. 375, CA; *per* Donovan L.J. at p.398.

may provide, which is unusual, to the contrary), a receiver who has been removed will, like any other agent who has properly made himself liable in respect of his principal's contracts, have a lien on the assets in his hands against all such liabilities personally incurred by him.[9]

Duty to cease to act. If, at any stage of his management of the company, the receiver has in his hands sufficient moneys to discharge all the debts of the company which he is bound to discharge, all possible claims which could be made against him and in respect of which he is entitled to an indemnity, his own remuneration, and all moneys secured by the instrument pursuant to which he was appointed, it will be his duty to cease to act with all due expedition; this should confine his further activities to taking the necessary steps to conclude his administration. If he continues to act, any accounts will be taken against him thereafter with annual rests from the date when he had sufficient moneys in his hands to cover all such amounts.[10] His continuance in possession of the company's assets thereafter might also be regarded by the courts as wrongful, since his appointment is only for the purpose of enabling the encumbrancers, entitled to the benefit of the instrument under which he was appointed, to recover their debt; once this purpose has been achieved, there is no ground for his continuance in office. The effect would be that thereafter he would be in the position of trespasser.[11] **26–3**

For various reasons, the receiver may have sufficient moneys in his hands for the above purpose, but may not be in a position to settle all possible claims which could be made against him and in respect of which he is entitled to an indemnity. He should then request his appointor to apply for his discharge, and should retain sufficient moneys to answer his indemnity, and account at once for any balance to the company. Alternatively, he may (but cannot be forced to) accept an indemnity from the company which may (but cannot be compelled to) offer such indemnity.

Death. If, after the death of a receiver, the company attempted to deal with its assets before the debenture-holders had an opportunity of appointing a new receiver, the company could clearly be restrained by injunction from so acting. In the normal case, an appointment will be promptly made in replacement, and the receivership can then be regarded as continuous,[12] but provision will of course have to be made to ensure the indemnification of the receiver's estate against all liabilities personally incurred by him. **26–4**

Continuity of receivership. Although the only directly relevant decision relates to a special statutory situation,[13] where a new receiver is appointed, **26–5**

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[9] *I.R.C. v Goldblatt* [1972] 498. The debenture holder who procured the removal of the receiver was also held liable. Crown preferences, involved in that case, have been abolished by Enterprise Act 2002, s.251 with effect from September 15, 2003.

[10] *Foxcraft v Wood* (1828) 4 Russ. 487.

[11] *cf. Ashworth v Lord* (1887) 36 Ch. D. 545.

[12] See below.

[13] *Re White's Mortgage* [1943] Ch. 166 (appointment of receiver requiring leave under the Courts (Emergency Powers) Act 1939.

in the place of a receiver who has died or been removed, without undue delay, the receivership may be regarded as continuous.[14] This is particularly important as regards any undischarged statutory duties, such as the duty to discharge preferential debts.[15] If these have not been discharged prior to the death or removal, then his personal representatives or the receiver himself, as the case may be, will, if the receivership can be regarded as being continuous, but not otherwise, be justified in accounting to the new receiver in respect of the entirety of the assets in his hand (save for such portion thereof as is required for his protection against contractual claims), leaving it to the new receiver to complete the statutory obligations in this regard.

If, however, the receivership cannot be regarded as continuous,[16] he cannot safely take this course. Nor, if no further receiver is to be appointed, can he simply take the course of accounting to the company, without first discharging all preferential debts, and distributing, if required, the "prescribed part" to the unsecured creditors.

26–6 Ceasing to act. Upon ceasing to act as such, the receiver or manager is required to render accounts, as set out below, and is also, on so ceasing, is required to give the registrar of companies notice thereof.[17] This notice is entered by the registrar in the register of charges. Default incurs a fine on summary conviction not exceeding one-fifth of the statutory maximum, and on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum.[18]

26–7 Vacation of office by administrative receiver. An administrative receiver will automatically vacate office on the making of an administration order[19]; but no such order is made without the consent of his appointor,[20] unless the security whereunder he was appointed is considered by the court to be liable to be set aside as being at an undervalue, or a voidable preference, or an invalid floating charge.[21] The relationship between the appointments of administrators and the appointment and functions of administrative receivers is considered in Chapter 14, above.[22]

Apart therefrom, he may at any time be removed from office by order of the court, but not otherwise.[23] Accordingly, no provision in the debenture

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[14] Insolvency Act 1986, s.46(2): see also s.62(6).

[15] Under Insolvency Act 1986, new s.176A, inserted by Enterprise Act 2002, s.253: see Ch.29, below.

[16] In *Re White's Mortgage*, n.14, above, a delay of 10 months was held to break the continuity of the receivership.

[17] Companies Act 1985 (as amended), s.409(2).

[18] n.17, above s.405(4). All notices under Companies Act 1985, s.405 must be in the prescribed form: see s.405(3). The appropriate form is Form 405(2) in Sch.3 to the Companies (Forms) Regulations 1985 (SI 1985/854).

[19] Formerly under Insolvency Act 1986, s.11(1)(b) (repealed): now under Insolvency Act 1986, Sched. B1, paras 39(1)(a), 41(1).

[20] Formerly under n.19, s.9(3)(a) (repealed); now under Insolvency Act 1986, Schedule B1, para.39(1)(b)(c)(d).

[21] n.19, s.9(3)(a)

[22] See Chap.14 above.

[23] Insolvency Act 1986, s.45(1).

whereunder he was appointed, authorising his removal by the appointor, or by anybody else other than the court, will be effective.

He will similarly vacate office, if he ceases to be qualified to act as an insolvency practitioner in relation to the company[24]; This will be without prejudice to the validity of any acts which he may have carried out, after he ceased to be so qualified.[25] In this event, he must forthwith give notice of his vacation of office to the liquidator of the company, if it is in liquidation, and to the members of the creditors' committee, if there is one.[26] Within 14 days, he must also send a notice to that effect to the registrar of companies.[27]

He may resign, by giving at least seven days' notice of his intention to do so to his appointor and to the company, or, if it is then in liquidation, its liquidator, specifying the date on which he intends his resignation to take effect.[28] Then, within 14 days after his vacation of office, he must send a notice to that effect to the registrar of companies.[29]

If the administrative receiver dies, his appointor must, forthwith upon his becoming aware of the death, give notice of it to the registrar of companies[30] and to the company, or, if it is then in liqnidation, to its liquidator.[31]

He will also, of course, vacate office on the completion of his receivership: all the same, in this case notices must be given as if he had vacated office in consequence of ceasing to be qualified as an insolvency practitioner.[32]

When he vacates office, his remuneration, any expenses properly incurred by him, and any indemnity to which he is entitled out of the assets of the company, will be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any security held by his appointor.[33]

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[24] n.23, s.45(2).

[25] Insolvency Act 1986, s.232; Schednle B1, para.104.

[26] Insolvency Rules 1986, r.3.35(1).

[27] Insolvency Act 1986, s.45(4). Such notice may be given by means of an indorsement on the notice required by Companies Act 1985, s.405(2) for the purposes of the register of charges: Insolvency Rules 1986, r.35(2). If an administrative receiver, without reasonable excuse, fails to comply with this obligation, he is liable on summary conviction to a fine not exceeding one-fifth of the statutory maximnm, and on conviction after continued contravention to a daily default fine not exceeding one-fiftieth of the statutory maximum: Insolvency Act 1986, ss.45(5). 430, Sch.10. He is no longer liable to a daily default fine, for continued default: s.45(5), as amended by Companies Act 1989, ss.107, 212, Sch.16.

[28] Insolvency Rules 1986, r.3.33(1), (2). The appropriate form is Form 3.9 in Sch.4: see r.12.7. No notice is necessary if he resigns in consequence of the making of an administration order: *ibid.* r.3.33(3). As appears from the text to nn.4–7 above, the receiver will automatically vacate office on the making of such an order, and the precise import of this subrule is accordingly unclear.

[29] See n.27, above, above.

[30] Insolvency Rules 1986, r.3.34(a). The appropriate form is Form 3.7 in Sch.4 to the Insolvency Rules 1986, r.12.7.

[31] Insolvency Rules 1986, r.3.34(b).

[32] Insolvency Rules 1986, r.3.35(1).

[33] Insolvency Act 1986, s.45(3).

26–8 Floating charge "re-floating" after receiver ceases to act. Where a receiver has ceased to act, for one reason or another,[34] for a period of one month, and no other receiver has been appointed, the floating charge, by virtue of which he was appointed, ceases to attach to the property the subject of the charge, and again subsists as a floating charge.[35]

For the purposes of calculating that period of one month, no account shall be taken of any period when an administration order was in force. A charge to which these provisions apply is sometimes referred to as having "re-floated".[36]

26–9 Accounts to be rendered upon ordinary receiver ceasing to act. On ceasing to act, the receiver must deliver the usual abstract within one month, and must include the figures from the last abstract,[37] up to the date of so ceasing.[38] It will, as in the case of all other abstracts, show the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.[39]

Where a receiver is appointed out of court, and subsequently the same person is appointed administrative receiver in a debenture-holders' action, his accounts are taken in the action: if a different person is appointed, the first receiver may apply by summons to have his accounts taken in the action.[40]

26–10 Accounts upon administrative receiver ceasing to act. Within two months (or such extended period as the court may allow) after ceasing to act as administrative receiver, he must send to the registrar of companies, to the company and to his appointor, and to each member of the creditors' committee (if there is one), the requisite account of his receipts and payments as receiver.

26–11 Balance in accounts due to company. The duty of the receiver to keep accounts and make them available for inspection by the company, as and when required, has already been noted. But whereas the receiver is not a debtor to the company in respect of any intermediate balance which might appear from his accounts to be due to the company, he will be a debtor to the company in respect of the final balance, after discharging all preferential debts and so forth, shown by his accounts to be due to the company. It follows that this balance can be the proper subject of a third party debt order.[41]

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[34] By dying, or losing his qualification, or resigning, or being removed by order of the court.
[35] Insolvency Act 1986, s.62(6).
[36] See n.35, above.
[37] The prescribed form is Form 497 in Sch.3 to the Companies (Forms) Regulations 1985 (SI 1985/854).
[38] Insolvency Act 1986, s.38.
[39] For penalty for default, see Insolvency Act 1986, s.38.
[40] *Practice Note* [1932] W.N. 79.
[41] As envisaged by the judgment in *Seabrook Estate Co. Ltd v Ford* [1949] 2 All E.R. 94, 97.

Remuneration, expenses and indemnity on vacation of office. Where a receiver or manager appointed under powers contained in an instrument, whether or not an administrative receiver, vacates office, his remuneration,[42] expenses properly incurred by him, and any indemnity[43] to which he is entitled out of the assets of the company, are charged on, and are to be paid out of any property of the company which is in his custody or under his control at that time, in priority to any charge or other security held by the person by or on whose behalf he was appointed.[44] **26–12**

Withdrawal of receiver before payment off of debenture holders in full. If a receiver is withdrawn by consent, before the debenture-holders have been paid off in full, any floating charge comprised in their security, having once crystallised, will not refloat automatically, and can only be made so to do by express agreement. A more difficult question is whether, after the withdrawal of a receiver, the debenture-holders are still entitled to a fixed equitable charge on the assets so released to the company; in principle, there appears to be no reason why this charge should not continue to attach to any assets which belonged to the company at the date of crystallisation, and which have not been disposed of during the receivership. The charge would not attach to assets of the company acquired subsequently to the date of crystallisation.[45] The practical results of this position are so inconvenient that it is thought that an intention to waive the fixed charge will readily be implied. **26–13**

Destination of books and papers. The ownership of documents in the possession of a receiver at the end of the receivership may vest in the company, or in the debenture-holders, or may remain with the receiver, depending on their nature. All documents generated by or received by the receiver pursuant to his duty to manage the business of the company, or to dispose of its assets, vest in the company. Documents containing advice and information about the receivership, or about the companies brought into existence by the receiver for the purpose of enabling him to advise the debenture-holders, belong to them. Notes, calculations, working papers and memoranda prepared by the receiver, not pursuant to any duty to prepare them, but better to enable him throughout to discharge his professional duties, belong to the receiver. **26–14**

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[42] As to the court's power to fix his remuneration, see n.33, above.

[43] As to his indemnity, see para.9–17 above. For the indemnity enjoyed by a receiver appointed by the court, see para.8–11 above.

[44] Insolvency Act 1986, s.37(1), (4) (ordinary receivers); s.45(3) (administrative receivers).

[45] *Re Yagerphone* [1935] Ch. 392. The passage in the test was criticised by Russell L.J. in *N.W. Robbie & Co. Ltd v Witney Warehouse Co. Ltd* [1963] 1 W.L.R. 1324 at 1338; but he omitted to observe that it is dealing with the position of future assets, acquired after (i) a crystallisation of the charge and (ii) a subsequent withdrawal of the receiver. It is still submitted that future assets fall within the scope of the floating charge only.

26–15 Transitional provisions of the Insolvency Act 1986. The 17th edition of this work contained, at pp.441 *et seq.* a detailed analysis of the law in force before Insolvency Act 1985 and Insolvency Act 1986 came into force, and of the changes effected by the new legislation, and of the transitional provisions relating to preferential debts.

2020 MBQB 58
Manitoba Court of Queen's Bench

White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited et al.

2020 CarswellMan 174, 2020 MBQB 58, 317 A.C.W.S. (3d) 238, 79 C.B.R. (6th) 44

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. C. B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

WHITE OAK COMMERCIAL FINANCE, LLC (Applicant) and NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGÅRD INTERNATIONAL PARTNERSHIP, NYGÅRD PROPERTIES LTD., AND NYGÅRD ENTERPRISES LTD. (Respondents)

Edmond J.

Judgment: March 26, 2020
Docket: Winnipeg Centre CI 20-01-26627

Counsel: Marc Wasserman, Jeremy Dacks, Catherine Howden, Eric Blouw, for Applicant
Wayne Onchulenko, for Respondents
Bruce Taylor, Ross McFadyen, Melanie LaBossiere (articling student), for Richter Advisory Group Inc.
David Jackson, Shayne Kukulowicz, Hylton Levy, for proposal trustee, A. Farber & Partners Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

WC LLC, lender, advanced funds to N Group to fund their payroll — Funding was advanced by WC LLC because N Group had not confirmed that sufficient funds were deposited in corporate account — N Group did not deposit necessary payroll funds, and WC LLC funded payroll to ensure that employee payroll was not interrupted during crucial time frame — New evidence was received, which included that N Group provided no indication of how they intended to fund payroll, that WC LLC had responded to N Groups funding request, but that N Group did not respond to WWC LLC's proposal — WC LLC brought application for R LLP to be appointed as receiver — Application granted — Further evidence satisfactorily showed that N Group had not been acting in good faith and with due diligence — As result of N Group failing to provide accurate and timely information to proposal trustee and WC LLC, proposal proceedings were untenable — Further, N Group had no plan to continue to fund its operations and no other lender had stepped up to provide necessary financing to pay out WC LLC — It was fundamental, for purpose of proposal process to continue, that N Group cooperate with proposal trustee and this had not occurred — Unilateral closing of its retail stores, distribution centres and website, without consulting with WC LLC or proposal trustee, was in breach of Credit Agreement and court order.

Table of Authorities

Cases considered by *Edmond J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Callidus Capital Corp. v. Carcap Inc. (2012), 2012 ONSC 163, 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — referred to

Dondeb Inc., Re (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — followed
Romspen Investment Corp. v. 6711162 Canada Inc. (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to
Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to
7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al (2019), 2019 MBCA 95, 2019 CarswellMan 772 (Man. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 69(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — pursuant to

s. 243(1) — considered

s. 244(1) — referred to

Court of Queen's Bench Act, S.M. 1988-89, c. 4
s. 55(1) — considered

APPLICATION by WC LLC for R LLP to be appointed as receiver.

***Edmond J.*:**

Introduction

1 The applicant, White Oak Commercial Finance, LLC applies pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("*BIA*") and s. 55(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, as amended ("*QB Act*") for the appointment of Richter Advisory Group LLP ("Richter") as receiver without security, of all assets, undertakings and properties of the respondents. On March 18, 2020, the court granted a receivership order and advised the parties that brief reasons for decision would be delivered following the hearing. These are those reasons.

2 By way of background, this matter proceeded in court on Tuesday, March 10, 2020 and was adjourned to Thursday, March 12, 2020, to permit the respondents to file responding affidavit material. Interim orders were made to preserve the status quo pending the hearing on the merits.

3 The respondents are identified in the affidavit material as the corporate entities operating retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the USA ("Nygård Group"). As at March 12, 2020, the Nygård Group operated 169 retail stores in Canada and the USA, operated a wholesale business and employed approximately 1450 employees.

4 The respondents filed an affidavit of Greg Fenske, affirmed March 11, 2020 and a supplemental brief for the hearing that proceeded on March 12, 2020. After hearing submissions from all parties, the court reserved its decision on whether Richter should be appointed as a receiver and ordered the Nygård Group to continue to fully

comply with the terms of the Credit Agreement entered into with Lenders, Second Avenue Capital Partners LLC and White Oak Commercial Finance, LLC ("Lenders") dated December 30, 2019 ("Credit Agreement") and that no Collateral (as defined in the Credit Agreement) would be disposed of outside of the ordinary course of business without the prior written consent of the applicant and the proposal trustee, A. Farber & Partners Inc.

5 During the course of the hearing on March 12, 2020, the court was advised that the Lenders advanced funds to the Nygård Group to fund their payroll due on March 12, 2020. The payroll funding was advanced by the Lenders because the Nygård Group had not confirmed that sufficient funds were deposited in the Nygård corporate account, by way of cash injection, to fund the payroll which was to be paid out by electronic fund transfer to employees. The Nygård Group had confirmed before the March 12, 2020 hearing that the payroll would be funded by way of a cash injection. Paragraph 10(a) of the proposal trustee's first report states:

> the Proposal Trustee attended on a call with representatives of the Nygard Group where the Proposal Trustee was advised that (i) funds sufficient to satisfy the payroll obligation had been deposited with the Nygard Group and evidence of such funding had been provided to Osler as required by the Winnipeg Court; (ii) the short term primary focus of the Nygard Group was to obtain funds to repay the Lenders in full so as to permit the Nygard Group to focus on a restructuring and rationalization of its business.

6 Contrary to the representations made to the proposal trustee, the Nygård Group did not deposit the necessary payroll funds. The Lenders therefore funded the payroll to ensure that the employee payroll was not interrupted during this crucial time frame. During the course of the hearing on March 12, 2020, counsel for the Nygård Group advised that an advance of payroll funding had been received and the Lenders' advance of payroll would be reimbursed from those funds.

7 The court was further advised later in the afternoon during the same hearing held March 12, 2020 that the payroll advance had been transferred from the Nygård Group bank account to a bank account of Edson's Investments Inc. The supplementary affidavit of Robert L. Dean affirmed March 17, 2020, states that Edson's Investment Inc. is an entity controlled by Mr. Nygård which is not part of the Nygård Group named as respondents in this proceeding and is not a party to the Credit Agreement.

8 The primary submission advanced by the respondents at the March 12, 2020 hearing was that the Canadian entities had filed Notices of Intention to make a Proposal in Bankruptcy ("NOIs") pursuant to s. 50.4 of the *BIA*, the stay of proceedings pursuant to s. 69(1) of the *BIA* applied and accordingly, the court should permit the proposal process to continue and stay the applicant's proceeding. Further, Nygård Group submitted that they had more than sufficient equity to pay out the Lenders in full and intended to have a proposal to do so by March 20, 2020.

9 On March 13, 2020, the court provided oral reasons for decision regarding the application and the motion made by the applicant to lift or terminate any stay of proceedings granted regarding the proposal process. To summarize, the court ordered:

> a) The proper jurisdiction to hear the application and the NOI proceedings is Manitoba;
>
> b) The NOI proceedings are not invalid or a nullity and the proposal proceedings should proceed in this court;
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> c) The draft cash flow statements prepared by the Nygård Group and provided to the proposal trustee must be provided to counsel for the applicant;
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> d) The application by the Lenders for the appointment of Richter as the receiver was adjourned until Friday, March 20, 2020;

e) The respondents were directed to continue to fully and promptly comply with all terms and provisions of the Credit Agreement and all documents ancillary thereto, and, without limitation, comply with s. 6.10 of the Credit Agreement;

f) Until further of the court, no steps would be taken by the respondents to dispense with or dispose of Collateral, as that term is defined in the Credit Agreement, other than:

i. by way of the sale of Collateral at the respondents' retail outlets in the ordinary course of business of such retail outlets; or

ii. with the advance written consent of the applicant and the proposal trustee;

g) All additional responding affidavit material must be filed in court by no later than 2:00 p.m. on Thursday, March 19, 2020;

h) In accordance with the undertaking given by counsel for the Nygård Group, the court directed the Nygård Group to return the payroll funds that were earmarked for payroll, which funds were transferred or removed from the Nygård Group corporate bank account on March 12, 2020;

i) The application was adjourned and the motion by the applicant to terminate or lift the stay of proceedings in effect pursuant to s. 69(1) of the *BIA* was denied at that time, although the court stated that the imminent necessity for appointing a receiver may change if reasonable steps were not taken by the Nygård Group to pay the outstanding indebtedness to the applicant and/or further evidence established that the Nygård Group failed to comply with the Credit Agreement during the period of the stay;

j) The respondents were given one week to cooperate with the proposal trustee in the proposal process in accordance with the *BIA* and act in good faith and with due diligence, including take reasonable steps as noted above.

New Evidence Received since March 13, 2020

10 A further affidavit affirmed by Robert L. Dean on March 17, 2020, confirmed, among other things:

a) The funds that the Nygård Group was supposed to have deposited in the Nygård Group bank account sufficient to satisfy the payroll obligation was not deposited. Funds were deposited, but then were removed or transferred out as noted above.

b) The proposal trustee forwarded a cash flow forecast to applicant's counsel during the March 12, 2020 hearing and the cash flow forecast contemplated continued funding by the Lenders despite the termination of the funding commitment.

c) A funding request from the Nygård Group included approximately $1.032 million Canadian for payroll, source deductions and rent. The Nygård Group provided no indication of how they intended to fund the payroll for the week of March 15, 2020.

d) On March 15, 2020, the Lenders responded to the Nygård Group's funding request advising they were prepared to provide funding on the following terms:

(a) The Lenders will fund the advance request (subject to review by Richter);

(b) The Nygard Group will engage a third-party liquidator to negotiate with Perry Ellis and liquidate US wholesale (and other assets immediately available for sale);

(c) The Nygard Group will confirm that the Lenders are authorized to speak to wholesale customers and Perry Ellis;

(d) The proceeds of any wholesale sale shall be immediately repaid to the Lenders;

(e) White Oak will receive a release from the Loan Parties and Peter Nygard on the same terms as White Oak previously communicated in the pay-off letter it previously provided, which shall be effective immediately;

(f) The Nygard Group will agree to remove the $20 million cap on the real estate Collateral;

(g) The Nygard Group will sign up a stalking horse (sic) bidder (with an approximately 10% deposit) with respect to the sale of the Toronto real estate, with any deal to close in 30 days (subject to a higher and better bid at auction);

(h) The Nygard Group will pay a $500,000 accommodation fee if the amounts owed to the Lenders are not repaid in full on or before March 20, 2020;

(i) The Nygard Group will agree to consent to the appointment of a receiver if the amounts owed to the Lenders are not repaid in full by March 20, 2020.

The Nygård Group did not respond to the Lenders' proposal.

e) On March 16, 2020, counsel for the applicant wrote to the proposal trustee regarding the payroll advance. On the same day, Richter wrote to the proposal trustee making inquiries about the continuing erosion of the Collateral requesting numerous updates, including:

(a) The status of discussions with Perry Ellis with respect to the U.S. wholesale inventory;

(b) The status of discussions with Great American on the potential refinancing of the Lenders' secured debt;

(c) The status of discussions with the party interested in the Toronto real property located at 1 Niagara St.;

(d) The Nygard Group's funding requirements for the current week and its plans on meeting its obligations on a go-forward basis.

(e) The return of the Late Transfer Funds that Mr. Nygard transferred out of the Nygard Group's bank account;

(f) The timing on receipt of a realistic cash flow forecast given the Nygard Group's current circumstances;

(g) The Nygard Group's plans to continue normal course operations given the closure of its Winnipeg and Toronto offices, including the potential layoff of corporate staff; and

(h) The Nygard Group's plans to curtail expenditures in the coming weeks in response to the significant decrease in retail sales.

f) The Nygård Group closed all of its distribution centres effective the evening of March 13, 2020, after courier and transportation companies refused to provide go forward service without guarantee of payment.

g) On March 17, 2020, the applicant received a copy of an e-mail from the Nygård Group indicating that the Nygård Group would be immediately shutting down its retail stores and website due to the recent COVID-19 outbreak. The e-mail made numerous additional representations about the Lenders' actions, which the Lenders submit are false and materially impact the Lenders' ability to realize on their Collateral.

h) The Nygård Group did not consult with the applicant, Richter or the proposal trustee regarding the potential closure of the retail stores and their business operations.

i) The Lenders have no faith that proper procedures to protect their Collateral will be undertaken by the Nygård Group.

11 On March 17, 2020, the proposal trustee issued its second report. The report confirms the following:

a) The proposal trustee requested that Nygård Group and management provide the proposal trustee with information respecting:

> (a) the status of the reimbursement of the Payroll Funding;
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> (b) the status of funding for ongoing operations during for the week ending March 20, 2020;
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> (c) the cash flows and the underlying assumptions., drafts of which were prepared by each of the members of the Nygard Group and provided to the Proposal Trustee on the evening of Wednesday, March 11, 2020 and the four wall forecasts provided on Sunday March 16, 2020;
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> (d) the status of operations of the Nygard Group including measures being taken in response to the Covid-19 crisis (i.e. whether or not the stores and/ or distribution centres are to remain open);
>
> (e) financial information relating to the Nygard Group's operations;
>
> (f) electronic contact information for all employees of the Nygard Group (or access to internal email system) to provide the statutory required notices of the NOI proceedings; and
>
> (g) the status of refinancing efforts of the Nygard Group.

b) Despite repeated requests for information, limited information was provided to the proposal trustee as established in the e-mails sent by the proposal trustee attached as Exhibits B and C to the second report.

c) The proposal trustee received information from the Nygård Group regarding efforts to sell real property located at 1 Niagara Street in Toronto, Ontario (the "Toronto Property"). The potential purchaser indicated that the offer to purchase is confidential. The proposal trustee advised the Nygård Group that it is not in a position to advise the court or stakeholders that the offer is fair or reasonable.

d) The proposal trustee received a copy of a notice entitled "Nygård closing 180 retail stores". The proposal trustee was not consulted in advance of the notice.

e) The second report concludes:

> 20. Based on the foregoing, the Proposal Trustee is not in a position to advise that the Nygard Group is acting with good faith or due diligence at this time.
>
> 21. The Proposal Trustee also notes that each of the members of the Nygard Group are required under the BIA to file cash flows by no later than Thursday, March 19, 2020 and such cash flows must be submitted to the OSB with a report from the Proposal Trustee on the reasonableness of the assumptions

> contained therein. The Proposal Trustee has not been provided with sufficient information to assess the draft cash flows provided and is of the view that it will not be in a position to file the required report on the reasonableness of the assumptions as required by the BIA.

12 Two affidavits affirmed by Greg Fenske, on March 18, 2020, were received by the court. The second affidavit is a confidential affidavit regarding the potential sale of the Toronto Property and the sale of certain inventory.

13 The first affidavit responds to the affidavit of Mr. Dean affirmed March 17, 2020 and can be summarized as follows:

a) An explanation is provided as to why the Nygård Group was unable to fund payroll. The Nygård Group requisitioned $1 million U.S. from an account at Stifel and the funds never made it into Nygård's Canadian bank accounts.

b) Nygård Group obtained a loan from Edson's Investments Inc. in the amount of $500,000 U.S. to fund payroll. These funds were returned or transferred back to Edson's Investments Inc. when the applicant provided the funds for payroll on March 12, 2020. While Mr. Fenske states the Nygård Group will receive funds from Stifel, as at March 18, 2020, no funds were received.

c) Nygård Group did advise the Lenders of the funds that were required to pay bills in accordance with the Credit Agreement.

d) The estimated payroll for the week of March 15, 2020, is $900,000 Canadian and "that will be funded by the Nygård Group resources". (it is unclear what that term refers to and if it is an entity, it is not a named respondent)

e) The Nygård Group received a verbal offer from Perry Ellis to purchase one-half of the inventory in the U.S. The amount is disclosed in the confidential affidavit.

f) While a proposal to pay out the Lenders was to be received from Great American Capital, no proposal was received and the Nygård Group has moved on to having discussions with other Lenders to pay out the secured debt. No concrete proposal was presented.

g) The offer to purchase the Toronto Property dated March 16, 2020 from New York Brand Studio Inc., in Trust, was attached as Exhibit B to Mr. Fenske's affidavit and the purchase price is redacted. The confidential affidavit discloses the purchase price and the amount is substantially different from the purchase price that was included in the earlier affidavit affirmed by Mr. Fenske on March 12, 2020.

h) Nygård Group states that cash will be coming in from the sale of assets until the stores are reopened.

i) Nygård Group unilaterally laid off 1370 employees and provides reasons for closing the offices and stores for the safety of the employees and customers as a result of the COVID-19 virus. Nygård Group confirms that the Lenders and the proposal trustee were not consulted prior to making the decisions.

j) The Nygård Group plans to sell real property and generate $25.4 million and pay $20 million to the applicant pursuant to the Lenders' security.

k) Mr. Nygård will divest ownership and all Nygård Group of companies will continue under different ownership allowing the purchasers to move forward with the current employees of the Nygård Group.

l) The affidavit provides information regarding the steps taken by Nygård Group to market the sale of assets. Mr. Fenske states that the consideration to be paid under the purchase and sale agreement of the Toronto Property "... is reasonable and fair and is substantially higher than a liquidation value of the Nygård Group

of companies assets in a Bankruptcy or Receivership." (See para. 29 of the affidavit of Greg Fenske affirmed March 18, 2020)

m) The proceeds from the sale of the Toronto Property and sale of inventory is to be paid to the applicant with the remainder of the monies, if any, to go to the proposal trustee to make a proposal to pay the remaining creditors.

n) The respondents seek an administrative charge to pay the proposal trustee and counsel for the proposal trustee.

o) Although no motion was filed, the respondents seek an extension of time of 30 days for the Nygård Group to make a proposal in bankruptcy.

p) Mr. Fenske states "... the Nygård Group of companies has acted, and is acting, in good faith and with due diligence in the proposal proceedings to date." (See para. 38 of the affidavit of Greg Fenske affirmed March 18, 2020)

Analysis and Decision

14 The starting point for analysis is to determine whether the applicant has met the test for appointing a receiver pursuant to s. 243 of the *BIA*. Section 243(1) of the *BIA* and s. 55(1) of the *QB Act* provide that a receiver may be appointed on application by a secured creditor, where it is "just or convenient" to do so. Such an order may authorize the receiver to:

243(1)

. . . . .

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

15 On February 26, 2020, the applicant sent a notice of intention to enforce security as required pursuant to s. 244(1) of the *BIA*.

16 I am satisfied on the basis of my review of all of the evidence, that it is just and convenient to appoint a receiver in the circumstances. I considered the factors outlined in the various authorities including:

a) Whether irreparable harm may be caused if no order is made, although such a requirement is not essential where, as in this case, the appointment of a receiver is authorized by the security documentation including the Credit Agreement. In this case, I am satisfied that irreparable harm may be caused if no order is made due to the various steps that have been taken by the Nygård Group as I will outline below;

b) The risk to the Lenders taking into consideration the Nygård Group equity in the assets and the need for protection or safeguarding of the assets;

c) The nature of the property, including real property and inventory and the potential that the value of the inventory is being materially impacted by steps taken by the Nygård Group.

d) The balance of convenience to the parties which, in my view, favours the appointment of the receiver to ensure the assets are protected, marketed in an appropriate manner to secure the highest market value and to take reasonable steps to ensure that employees of the Nygård Group are protected.

e) The fact that the applicant has the right to appoint a receiver under the Credit Agreement.

f) The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly. The evidence satisfies me that the appointment of a receiver is necessary, just and convenient in the circumstances.

g) I also considered the effect of the order on the parties, the conduct of the parties, the length of time that the receiver may be in place, the cost to the parties and the likelihood of maximizing return to the parties. All of these factors favour appointing a receiver in the circumstances. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]); *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, [2012] O.J. No. 62 (Ont. S.C.J. [Commercial List]); *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, [2014] O.J. No. 2146 (Ont. S.C.J. [Commercial List]); *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]); and *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 95, [2019] M.J. No. 246 (Man. C.A.) (QL))

17 I previously found, as outlined in my reasons for decision given March 13, 2020, that the evidence filed presented a "... strong basis and rationale for the applicant to be concerned about the stability of the Nygård Group and in my view justifies the applicant taking steps to enforce its security and seek immediate repayment of the outstanding indebtedness. The Dean affidavit outlines in considerable detail the breaches of the Credit Agreement. (Exhibit D to Mr. Dean's affidavit) and the reason why the applicant has lost all confidence and faith in the Nygård Group complying with the governing Credit Agreement."

18 Had the Canadian Nygård entities not filed the NOIs, I would have had no hesitation in granting the receivership order last week. As explained in my reasons for decision delivered March 13, 2020:

The proposal provisions of the *BIA* permit insolvent persons to avoid or postpone bankruptcy by complying with the provisions by appointing a proposal trustee and making a proposal to all creditors, including secured creditors. The proposal trustee must review Nygård Group cashflow statements and the proposal for their reasonableness and file reports in court. The proposal trustee monitors the debtors and must report regarding any material adverse change to creditors without delay after receiving information regarding any changes, which adds transparency to the proposal process.

The proposal trustee is an officer of the court and must impartially represent the interests of creditors. If the proposal trustee knows of dispositions, transfers of property or steps taken by the debtor that are material, the proposal trustee must disclose that information to creditors so that they may take such action as they deem appropriate.

It is necessary for the court to weigh the interests of all creditors in the proposal process and the interests of the primary secured party, the applicant. I am satisfied that it is in the best interests of all of the creditors to permit the respondents to restructure and make a viable proposal to the creditors pursuant to the proposal process.

That said, I am not satisfied that Nygård Group has been dealing with its lenders in good faith and the appropriate action to take is to impose deadlines on the Nygård Group to satisfy the statements made in the Fenske affidavit and made orally by the respondents' counsel in court yesterday.

In my view, it is premature to terminate or lift the 30 day stay period, particularly in light of the representations that the Nygård Group has made to this court. I am not satisfied that there is no viable proposal that can be made by the respondents as submitted by the applicant.

The evidence filed by the respondents suggests that a viable proposal may be made to creditors and to the applicant. While there is evidence that the respondents have not acted in good faith and with due diligence in their dealings with the applicant, I direct that the respondents must continue to comply with the terms and conditions of the credit agreement and ancillary documents pending receipt of the outcome of the negotiations that are presently being undertaken to pay out the indebtedness of the applicant by March 20, 2020.

I am not satisfied that the applicant will be materially prejudiced by the continuing operation of the stay of proceedings, so long as the respondents are making good faith efforts to continue to operate the Nygård Group business in the best interests of all stakeholders, including making arrangements to continue to meet the payroll and pay its employees and taking immediate steps to finalize financing to pay the outstanding indebtedness of the applicant by March 20, 2020.

In the meantime, over the course of the next week, the respondents are ordered and directed to provide RAG ongoing access to financial information by virtue of the inspection rights under the credit agreement. The Nygård Group must not dispose of any assets or transfer shares or transfer funds deposited in the corporate bank accounts to other bank accounts other than in the ordinary course of business without consent of the proposal trustee, the applicant and RAG.

If necessary, the court will make a determination if there is a dispute about a step proposed to be taken by the Nygård Group. In other words, all business of the Nygård Group, including transactions, shall continue in the ordinary course of business and in accordance with the strict terms of the credit agreement.

19 The further evidence that has been filed since March 13, 2020, satisfies me that the Nygård Group has not been acting in good faith and with due diligence. I am also satisfied that the Nygård Group cannot be left as a debtor in possession and the proposal process cannot continue. The second report from the proposal trustee states that the proposal trustee is not in a position to advise that the Nygård Group is acting with good faith or due diligence at this time. Further, the proposal trustee was not provided with sufficient information to assess the draft cash flows provided and is not in a position to file the required report on the reasonableness of the assumptions as required by the *BIA*.

20 As a result of the Nygård Group failing to provide accurate and timely information to the proposal trustee and the Lenders, the proposal proceedings are untenable. Further, the Nygård Group has no plan to continue to fund its operations and no other lender has stepped up to provide the necessary financing to pay out the Lenders.

21 The closure of the retail stores, distribution centres and website without consulting the Lenders and the proposal trustee is a serious concern that directly affects the ability of the Nygård Group to continue to operate and for the applicant to realize on the Collateral.

22 I agree with the applicant that the Nygård Group has provided no information to the Lenders about:

a) What has happened to the employees and specifically how they have been dealt with;

b) How the retail stores are being secured and locked down;

c) How the inventory located in the stores is being dealt with, if at all;

d) What is happening with the Nygård Group wholesale customers; or

e) How the Nygård Group is planning to sell its inventory other than the reference to the Perry Ellis potential offer.

23 It is fundamental for the proposal process to continue that the Nygård Group cooperate with the proposal trustee and that the proposal trustee be in a position to state specifically that the parties subject to the proposal proceeding have been acting in good faith and with due diligence. As noted above, that has not occurred.

24 In addition to the foregoing, the Nygård Group has failed to comply with orders made by this court and undertakings given by their counsel. Specifically, and contrary to their counsel's representations in court on March 12, 2020, the Nygård Group has failed to return the payroll funds to the Nygård Group's bank account and repay the applicant the payroll advance. The explanation provided in the affidavit of Mr. Fenske affirmed March 18, 2020 is inconsistent with what the court was advised on March 12, 2020.

25 The Nygård Group was directed pursuant to orders made by the court on March 12 and 13, 2020, to continue to comply with the Credit Agreement. The unilateral closing of its retail stores, distribution centres and website without consulting with the Lenders or the proposal trustee is in breach of the Credit Agreement and the court order. I also find that it is a material adverse change to the creditors which placed the proposal trustee in the position of not being able to comply with its duties under the *BIA*.

26 I agree with the applicant that in light of the events that have occurred since March 12, 2020, the appointment of Richter was urgently required and Richter was appointed as receiver effective March 18, 2020.

27 Richter is in the best position to assess the reasonableness of the offers to purchase the real estate and make a motion to court with evidence seeking approval. The evidence filed by the Nygård Group is insufficient to assess the reasonableness of the sale of the Toronto Property and the real estate located in Winnipeg. The proposal trustee stated at para. 15 of the second report that it is not in a position to advise the court or stakeholders that the offer respecting the Toronto Property is fair and reasonable.

28 The events that occurred since orders were made on March 12 and 13, 2020, are material developments that have caused or had the potential to cause a material prejudice to the Lenders and to the Nygård Group's business, creditors and stakeholders.

29 The adjournment of the receivership application on March 13, 2020 and allowing the proposal proceedings to continue with the oversight of the proposal trustee was not granting the Nygård Group a licence to operate with impunity. The court's decision on March 13, 2020, was to allow the respondents a limited period of time to make good faith efforts to repay the debt owing to the Lenders and to fully cooperate with the proposal trustee.

30 I am satisfied that the appropriate course of action is to lift the stay of proceedings that was granted pursuant to s. 69(1) of the *BIA*. The court has jurisdiction pursuant to s. 69.4 of the *BIA* to lift the stay in circumstances in which the court is satisfied:

69.4

. . . . .

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

31 In my view, both of these requirements have been satisfied in this case. I agree that the Lenders will suffer a material prejudice if the receivership is not granted. While I accept that the shutdown of the retail operations may have been appropriate and necessitated by the COVID-19 virus, the closure of the business, distribution centres and website, without any consultation with the Lenders and the proposal trustee is prejudicial. The proposal trustee

and the Lenders require the ability to oversee the preservation of the Collateral including the inventory and to maintain continuity with employees. The notice sent out by the Nygård Group was inappropriate, referring to unrelated matters and alleging misrepresentations regarding the actions of the Lenders. Regrettably, the notice sent to employees and customers did not achieve certainty regarding the Nygård Group business operations at this difficult time during the COVID-19 pandemic. Instead, it blamed others for the financial difficulties and caused greater uncertainty and instability in the Nygård Group business operations.

32 Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the *BIA* under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.

33 While the court has the authority pursuant to s. 50.4(11) of the *BIA* to terminate the 30-day period on the basis that the criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.

34 Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020.

35 A similar approach was taken by the Ontario Superior court in *Dondeb Inc., Re*, 2012 ONSC 6087, [2012] O.J. No. 5853 (Ont. S.C.J. [Commercial List]) and, in my view, that approach is equally applicable in this case.

Conclusion

36 The court grants a stay of the proposal proceedings commenced by the NOIs until further order of the court. The court also grants a receivership order appointing Richter as the receiver in accordance with a draft order that was reviewed in court on March 18, 2020.

37 Richter will be funded by the Lenders in accordance with the term sheet attached as Schedule B to the receivership order and will be subject to the oversight and jurisdiction of this court.

Application granted.

End of Document

Railroad Company v. Soutter

69 U.S. 510 (1864)
Decided Jan 1, 1864

DECEMBER TERM, 1864.

1. Though a court below is bound to follow the instructions given to it by a mandate from this, yet where a mandate has plainly been framed, as regards a minor point, on a supposition which is proved by the subsequent course of things to be without base, the mandate must not be *so* followed as to work manifest injustice. On the contrary, it must be construed otherwise, and reasonably. 2. The appointment or discharge of a receiver is ordinarily matter resting wholly within the discretion of the court below. But it is not always and absolutely so. Thus, where there is a proceeding to foreclose a mortgage given by a railroad corporation on its road, c. — a long and actively worked road — (a sort of property to a control of which a receiver ought not to be appointed at all, except from necessity), and the amount due on the mortgage is a matter still unsettled and fiercely
511 contested, the appointment *511 or discharge of a receiver is matter belonging to the discretion of the court in which the litigation is pending. But when the amount due has been passed on and finally fixed by *this* court, and the right of the mortgagor to pay the sum thus settled and fixed is clear, the court below has then no discretion to withhold such restoration; and a refusal to discharge the receiver is judicial error, which this court may correct, supposing the matter (not itself one in the nature of a final decree) to be in any way fairly before it otherwise. If other parties in the case set up claims on the road, which they look to the receiver to provide for and protect, these other claims being disputed, and, in reference to the main concerns of the road, small, — this court will not the less exercise its power of discharge. It will exercise it, however, under conditions, such as that of the company's giving security to pay those other claims, if established as liens.

Mr. Carpenter, for the appellants.

1. The proceedings had in the court below, by which the amount due on the bonds secured by the mortgage to Bronson and Soutter was ascertained and a decree entered, was not according to the direction of the mandate. The decree, indeed, gave the year to pay; but this, and all else that was done, was ordered *before and without* ascertaining what sum was in the receiver's hands. Now, the authority of the inferior court extends only to executing the mandate sent it. They cannot vary it, or give *any other or further* relief.† Under that mandate the court was bound "to ascertain the amount of moneys in the hands of the receiver," and its authority to order a sale arose only "IF" the amount was not sufficient to discharge the interest.

† *Ex parte* Dubuque and Pacific Railroad, Id. 69.

2. The appellants complain of the denial of their petition to the Circuit Court, since the cause was remanded, for leave to pay into court all the money due the complainants in this cause, and for possession of the mortgaged premises.

It is admitted that this order is not such as might be appealed from before a final decree. But, when an appeal is properly taken from a final decree, as it has been decided that the present one is,‡ the appellant may be relieved from any interlocutory order or proceeding by which he is aggrieved. The continuance of the receivership until

the final decree, or until the amount due the complainants is paid into court, is matter of discretion, and not reviewable here. But after the amount due the complainant had been fixed by a final decree, as that also has been in this court,[§] and *517 the owner of the equity of redemption offered to pay that amount into court, the discharge of the receiver was demandable as a matter of right; and its refusal was error, which can be reviewed here.

517

‡ See *supra*, p. 440.

§ See *supra*, p. 312.

The Milwaukie and Minnesota Railroad Company was owner of the equity of redemption. As such, it had the right to redeem all prior incumbrances, and the foreclosure under which it was organized extinguished all liens of a date subsequent to that of the mortgage, on the foreclosure of which it came into existence. It was, therefore, entitled to possession, unless some other person could show better right thereto.

Howard's lien was declared by this court to be extinguished.– The language of the Supreme Court is this:

– *Supra*, p. 304.

"Now it appears that each of these judgments were recovered after the date of the mortgage on the La Crosse and Milwaukie Company, upon the foreclosure of which the Milwaukie and Minnesota Company was formed. The liens of these judgments were cut off by its foreclosure; indeed, the judgment of *Howard*, of November, 1858, and the last judgment of Graham and Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse and Milwaukie Railroad Company."

It will be said that this opinion was delivered under a mistake of fact. Perhaps it was so, and perhaps, in a proper proceeding in his case, it may be found that Howard has a valid subsisting lien; but, on this motion, we must consider the presumption to be the other way, and act accordingly.

Chamberlain's opposition demands more respect. He claimed possession under his lease and judgment, which, the case shows, had been vacated by the decree of the District Court. This decree may be erroneous, but cannot be questioned collaterally. It was rendered in a cause in which the complainant, as a judgment creditor, sought to vacate the lease and judgment. *518

518

The opposition of the Milwaukie and *St. Paul* Railroad has no foundation except in selfish interest. The motives of that company to keep the road *out* of the hands of its true owners, and *in* the hands of a receiver, interested in his commissions chiefly, are obvious when the topographical position of the rival companies is seen. It is a case where pecuniary motive is as strong as better reasons are weak.

Messrs. Cary and Carlisle, contra.

1. The mandate has been as well observed as in the nature of the difficulties it could be. The obligation of an inferior court to obey the order sent it, is not to be followed to the extent of sacrificing the spirit of the order to its letter.

The denying the appellant's motion to have the receiver pay the money in his hands into court, to discharge him, and to hand the road over to the Milwaukie and Minnesota Company, is so clearly a matter pertaining to the practice of the court below, and so entirely within the discretion of that court, that we have been surprised to hear counsel of Mr. Carpenter's ability, and regard to what positions he asserts, insist upon his right to appeal from it. Such matters *must* be left to discretion, if such a thing as discretion is to exist in an inferior court at all. But if this court will consider a matter in which, from the nature of the case, we think it has no good

opportunity to form a judgment, then we say that both the judgment of Howard and the claim of Chamberlain should control the question. The receiver was appointed on Howard's motion. This court has, indeed, said.– that his lien was discharged. Undoubtedly this idea proceeds on a misapprehension of fact. Howard's judgment in the State court against the La Crosse Company was recovered on the 1st day of May, 1858, and became a lien *prior* to the mortgage under which the Milwaukie and Minnesota Company sprung. This judgment was "sued over" in the Federal court, and judgment obtained there November 28th, 1859; but the record, of course,
519 discloses the original lien of *519 his judgment. The opinion of this court mentions the How ard judgment in the *Federal* court, but makes no mention of the judgment in the State court upon which the judgment of the Federal court was founded. Suing over in the Federal court did not extinguish its lien.

– *Supra*, p. 304.

Chamberlain or Howard — if anybody but the present receiver — should have the road. Chamberlain was a judgment creditor and a lessee of the road. Counsel insist that the effect of that decree in the District Court was to *vacate and annul* the judgment and lease as to all the world, and that they are now of no force or effect, as between the parties thereto. But such, *we* apprehend, is not the effect in law. The effect of that decree was but to postpone the lease to the judgment of another party. The Milwaukie and Minnesota Company can claim no advantage from it.

The attack on the Milwaukie and St. Paul Railroad Company is gratuitous wholly. Legal rights are not to be denied it, merely because the granting of those rights are necessary to its interests and would greatly promote them. Yet this, in effect, is the argument of the other side.

BRONSON and Soutter had filed a bill in the Circuit Court for Wisconsin, against the *La Crosse and Milwaukie* Railroad Company, to foreclose a mortgage given by the said company to them to secure bonds to the extent of one million of dollars, which that company had put into circulation, and the interest to a large amount on which was due and unpaid. To this bill the *Milwaukie and Minnesota* Railroad Company — a company which, on a sale under a mortgage *junior* to that of Bronson and Soutter, was organized, and became, under the laws of Wisconsin, successor in title and interest to the *La Crosse and Milwaukie* Company, and also three other persons, one named Sebre Howard — were made or became defendants, and opposed the prayer for foreclosure. They alleged that the bonds which the mortgage to Bronson and Soutter had been given to secure, had been sold, transferred or negotiated at grossly inadequate prices, fraudulently in fact, and were not held for full value by these persons, who sought by the foreclosure to recover their par. The court below, being of this opinion, gave a decree in that suit to the extent of but fifty cents on the dollar. Coming here by appeal at the last term,– the decree, after an animated, protracted, and very able argument in support of it by *Mr. Carpenter*, in
512 behalf of numerous parties interested, was reversed, and a decree ordered to be entered *512 below for the full amount, *cent* for *cent*.– The suit, at the time of the decree here, had been pending for four years. The mandate from this court ran thus:

– See *supra*, page 283.

– See *supra*, page 312.

"It is ordered that this cause be remanded to the Circuit Court of the United States for the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court *ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest*, and apply it to the same; and that *if* the moneys thus applied are not sufficient to discharge the interest due on the first day of March, 1864, *then* to

ascertain the balance remaining due at that date. *And in case such* balance is not paid within one year from the date of the order of the court ascertaining it, *then* an order shall be entered directing a sale of the mortgaged premises."

Upon the filing of this mandate in the court below, the receiver was ordered to make report of the funds in his hands; from which it appeared that he had some $50,000 to $60,000 applicable to the payment of the interest on the bonds in suit.

The Milwaukie and Minnesota Railroad Company, who, as already stated, was an incumbrancer on the road, *junior* to Bronson and Soutter, insisted that instead of this small amount, there was really, or ought to be, in the receiver's hands, between $300,000 and $400,000 applicable to the payment of interest; and asked an order of reference to a master, with instructions to hear testimony, and ascertain and report on this claim. The court made the order, and postponed further action in the case, until the succeeding term in September. At that term it was ascertained that the master would be unable to report on the complicated accounts of the receiver, involving several millions of dollars; and the receiver was again ordered to report the funds actually in his
513 hands. From this second report, it appeared, *513 that he had no money properly applicable to the payment of the debt of Bronson and Soutter, and thereupon the court proceeded to ascertain the amount of interest due on the bonds secured by their mortgage, and entered a decree accordingly, giving the defendant a year to pay it, before a sale of the mortgaged premises.

From this decree the Milwaukie and Minnesota Railroad Company, the already mentioned successors in title and interest to the La Crosse and Milwaukie Railroad Company, appealed; the first ground assigned for their appeal being that the decree was a departure from the mandate of the court, because such decree should not have been rendered *until the accounts of the receiver were adjusted, and it was judicially ascertained how much of the millions he had received ought now to be applied to the payment of complainants' interest*.

But another matter was now presented here.

At the first term of the court below, after the mandate was filed, the Milwaukie and Minnesota Railroad Company proposed to pay all the interest due on the mortgage of Bronson and Soutter, on condition that an order should be made, discharging the receiver, and placing the road and its appurtenances in the possession of them, the Milwaukie Company, just named. Upon the hearing of this petition, the judges of the Circuit Court were divided in opinion, and the application so, necessarily, refused.

The amount of Bronson and Soutter's debt, above mentioned, exclusive of interest, which the Milwaukie and Minnesota Railroad Company proposed to pay, was one million of dollars; and this, added to twelve hundred thousand dollars of prior mortgages, made two millions two hundred thousand dollars, which the road and its appurtenances would have to be worth, in order to secure the debt of Bronson and Soutter. The road on which the mortgage was a lien is ninety-five miles, and runs from Milwaukie to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It was in good condition. It constitutes a part of the direct line
514 from Milwaukie to the *514 Mississippi, and is one of the valuable railroads of the United States. The gross earnings from this ninety-five miles for the year preceding the application to discharge the receiver, as shown by his reports, were about eight hundred thousand dollars; though the reports showed a large falling off in the receiver's receipts of later time.

In addition to the opposition made to this motion by Bronson and Soutter, it was opposed by one Sebre Howard, who, with the Milwaukie and Minnesota Railroad Company, had been a defendant to their bill, and on whose motion the receiver had been appointed. Howard objected to the discharge, because, as alleged, he had a

judgment of $16,000 against the La Crosse and Milwaukie Railroad Company, which he asserted to be a lien on the road; though whether it was so or not, depended on some questions of fact and law, not perhaps quite clear. This court, assuming a certain state of facts, decided that he had; but it was said that facts had not been well explained to the court.

One Selah Chamberlain, too, opposed it; objecting to the discharge of the receiver, and particularly to delivering the property into possession of appellants, because, as he asserted, he himself was holder of a lien of over $700,000 in the road, and because that lien, according to his view, was secured by a lease which entitled him to the possession of the road. This same Chamberlain had been in possession under his lease for some time prior to the appointment of the receiver, under a contract with the La Crosse and Milwaukie Railroad Company, by which he bound himself to keep down the interest on the various mortgages on the road, including the one on which Bronson and Soutter had filed their bill. This he had failed to do, and he had actually abandoned the possession to the Milwaukie and Minnesota Company, who were in possession at the time the receiver was appointed. His judgment on a suit by the complainants had been assailed, and as it seemed, though counsel denied this view, declared to be fraudulent and void, by a decree of the District Court of the United States; but
515 that question was not finally determined. *515

A *third* railroad company, called the Milwaukie and St. Paul Company, a rival company of the Milwaukie and Minnesota, whose relation to it will appear in the diagram below, also opposed the discharge.

This company was an organization created after the litigation already mentioned, as brought about by the proceedings of Bronson and Soutter to foreclose their mortgage, had commenced. It was no party to preceding suits. It owned the *western* end of the La Crosse and Milwaukie Railroad; that is to say, the road from Portage to La Crosse (one hundred and five miles), and was organized for the purpose of working a road, as its name imports, from Milwaukie to St. Paul; of course, the ownership and control of an eastern end was indispensable to the purpose. This company had procured, in June, 1863, an order from the District Court, that the receiver should deliver to them the eastern end of this road, and all its appurtenances, and they had used them from that
516 day. This court, however, subsequently declared the proceeding of the District Court to have been without *516 jurisdiction, and the order a usurpation of authority.– The interest of this third company was, of course, of a strong character, for the necessities of their situation required that they should own an *eastern* end of the road, to complete their line from Milwaukie, one great terminus of the road to St. Paul.

– Bronson *v.* La Crosse Railroad Company, 1 Wallace, 405.

Mr. Justice MILLER delivered the opinion of the court.

The first ground assigned for the appeal is, that the decree is a departure from the mandate of the court, because it should not have been rendered until the accounts of the receiver were adjusted, and it was judicially ascertained how much of the millions he had received ought now to be applied to the payment of complainants' interest coupons.

This construction of the mandate cannot be sustained. The receiver is the officer of the court, and neither party is responsible for his misfeasance or malfeasance, if any such exists, and it was not, therefore, reasonable that complainants should be delayed in the collection of their debts until the close of a litigation over the receiver's accounts, which might occupy several years. The suit had already been pending four years, and the mandate required the Circuit Court, in its decree *nisi*, to give another year for the payment of the sum found due. To
520 suppose that this court *520 intended, in addition to these five years, to withhold the recovery of complainants for the additional uncertain period which might be necessary to litigate the receiver's accounts, is to impute to it

a manifest injustice. The language of the mandate had reference to the sum *actually* in the receiver's hands, properly applicable to the payment of this debt, and not to what it might turn out on full investigation *ought* to be there for that purpose. This court had no reason to suppose that there would be any controversy with the receiver on the subject, and framed its mandate on the supposition that all the money for which he would be responsible, would be at once forthcoming. If such is not the case, neither the loss nor the delay of ascertaining the fact was intended by this court to be imposed on the complainants. The decree of the court is, therefore, AFFIRMED.

But another order was made by the Circuit Court, of a very important nature, after the return of the case from this court, and before the decree just affirmed, which appellants seek to have reversed.

At the first term of that court after the mandate was filed, the appellant proposed to pay all the money due on complainants' mortgage, on condition that an order should be made discharging the receiver, and placing the road and its appurtenances in the possession of appellants. Upon the hearing of this petition of appellant, the judges of the Circuit Court were divided in opinion, and the application was thereupon refused, as it was not a division upon a subject which is authorized to be certified to this court for its action.

The appellant insists that this court shall now review the order of the Circuit Court on this subject; and while conceding that it is not such an order, as standing alone could be the subject of an appeal, contends, that as the record is properly here on appeal from the final decree which we have just considered, the whole record is open
521 for our inspection, and that it is our duty to correct the error of which he complains in this particular. *521

There is no question but that many orders or decrees, affecting materially the rights of the parties, are made in the progress of a chancery suit, which are not final in the sense of that word in its relation to appeals. The order of the court affirming or annulling a patent, and referring the case to a master for an account, is an instance. The adjudications which the court makes on exception to reports of masters, often involving the whole matter in litigation, are not final decrees; and in these and numerous other cases, if the court can only, on appeal, examine the final or last order or decree which gives the right of appeal, it is obvious that the entire benefit of an appeal must, in many cases, be lost.

The order complained of in this case seems to be one of this class. The complainants are seeking a foreclosure of a mortgage with a view to make their debt. The owner of the equity of redemption in the mortgaged premises comes forward and offers to pay this debt, or all of it that is due, provided his property, which is in the custody of the court, shall then be restored to his possession. The right of the owner to this order is, under ordinary circumstances, very clear, and a refusal by the court to give him this right would seem to call for the revisory power of this court, when the whole case is before it, on the record brought here by appeal from a final decree.

The only doubt which the court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court, with which this court will not interfere.

As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment, or the discharge of a receiver for the mortgaged property, very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this court also on appeal, and the amount of the debt definitely fixed
522 by his court, the right of the defendant *522 to pay that sum, and have a restoration of his property by discharge

of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error — judicial error — which this court is bound to correct when the matter, as in this in stance, is fairly before it. That the order asked for by appellants should have been granted, seems to us very clear.

It was objected by the complainants that the receiver should not be discharged, because the security of the road and its appurtenances was not sufficient to insure the payment of their debt, and, therefore, its receipts should be applied to that purpose through the agency of a receiver.

The amount of complainants' debt, exclusive of the interest (which appellants proposed to pay), was one million of dollars, which, added to twelve hundred thousand dollars of prior mortgages, made the sum of two millions two hundred thousand dollars which the road and its appurtenances should be worth to secure complainants' debt. The road bed on which complainants' mortgage is a lien is ninety five miles from Milwaukie to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It constitutes a part of the direct line from the former city to the Mississippi River, which is one of the most valuable routes in the United States, both present and prospective. The gross earnings from this ninety-five miles for the year preceding the application to discharge the receiver, as shown by his reports, were about eight hundred thousand dollars; and although these reports show a great falling off in the receiver's receipts since that time, the circumstances which have produced it are not of a character to incline us to continue the road in the possession of a receiver. The road was also in good repair. The decree which we have just affirmed authorizes the complainants, upon default in payment of any future instalment of interest, to apply for and have an order of sale of the road under that decree. Under these circumstances, when appellants propose to pay to me $300,000
523 of *523 $400,000 of complainants' debt before possession is given, it is idle to say that the security of their debt requires the road still to be detained from its lawful owner.

Sebre Howard objects to the discharge of a receiver, because he has a judgment of $16,000 against the La Crosse and Milwaukie Railroad Company, which he claims to be a lien on the road; and as the present receiver has also been appointed receiver in his suit, he claims that his debt must first be paid before he can be discharged.

The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars worth of property — of such peculiar character as railroad property is — from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court.

Selah Chamberlain objects to the discharge of the receiver, and particularly to delivering the property into possession of appellants, because he says he has a lien of over $700,000 on the road, and because that lien is secured by a lease which entitles him to the possession of the road.

Mr. Chamberlain had been in possession under his lease for some time prior to the appointment of a receiver, under a contract with the La Crosse and Milwaukie Railroad Company, by which he bound himself to keep down the interest on the various mortgages on the road, including the one on which this suit is brought. This he had failed to do, and had actually abandoned the possession to the complainants in this suit, who were in possession at the time the receiver was appointed. His judgment was assailed, and declared to be fraudulent and

524 void by a decree of the District Court of the United States. There is a question whether that decree *524 is binding as between him and the present appellants, which we do not intend to decide here; but we refer to this fact as having strong influence on the question of the propriety of keeping the road in the hands of a receiver for his benefit, or delivering it to him if the receiver is discharged. We shall endeavor to protect his interest, whatever it may be, in any order that shall be made on the subject.

As to the Milwaukie and St. Paul Railway Company, who also resisted this application, we do not see that they have any legal interest in the matter; and the interest which prompts their interference is not such as the court can consider on an application of this kind.

In reference to all these parties we remark again, that the court deprives them of none of their rights to proceed in the courts in the ordinary mode to collect their debts, and that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers, the exercise of which can only be justified by the pressure of an absolute necessity. Such a necessity does not exist here; and the fact that so many years of the exercise of this power has not produced payment of any part of the debts which the receiver was appointed to secure, is an irresistible argument against his longer continuance.

The order of the court dismissing this application is, therefore, REVERSED, and the case remanded to the Circuit Court, with instructions to ascertain the amount due to complainants within some reasonable time to be fixed by said court, and to make an order that on the payment of that sum, with the costs of complainants, into court, the receiver shall be discharged, and the railroad from Milwaukie to Portage City, with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road, be delivered by said receiver to the Milwaukie and Minnesota Railroad Company; but that no such discharge of the receiver, or delivery of the road and its appurtenances, shall be made until said company shall first enter
525 into bond *525 with sufficient surety to pay to Sebre Howard and Selah Chamberlain all such sums as may come into the hands of said company, which shall hereafter be found to be rightfully applicable to the payment of their claims, if they shall be established as liens on said road. And the appellants to recover their costs in this court.

ACTION ACCORDINGLY.

Manitoba Statutes
The Court of Queen's Bench Act
Part VIII — Jurisdiction and Law (ss. 32-40)

S.M. 1988-89, c. 4, s. 37

s 37.

Currency

37.

37(1)Vesting orders

The court may by order vest in a person an interest in real or personal property that the court has authority to order to be disposed of, encumbered or conveyed.

37(2)Execution by order of the court

The court may, on such terms and conditions as may be just, order or nominate a person to execute a document or endorse a negotiable instrument and the execution or endorsement by the person has the same force and effect as if executed or endorsed by a person originally entitled to do so.

Currency

Manitoba Current to S.M. 2020, c. 15 and Man. Reg. 90/2020 (September 21, 2020)

End of Document

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

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Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to

extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules

(BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

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APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of

the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value. [3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;
>
> (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
>
> (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by

utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal) [4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property. [5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,

(c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and

(c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) [6].

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report"). [7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009. [8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable. [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the

restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British

Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting

order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests. [9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought

to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction. [10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial

register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

> 1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.
>
> 2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

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